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92-1959

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, INC., ET AL.,

Petitioners,

v.

DAN MORALES, Attorney General of Texas,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard used by the Fifth Circuit in determining that *Pullman* abstention should be applied in this case is inconsistent with the standard used by other circuit courts and in conflict with the requirement announced by this Court that a case must turn on an *ambiguous* issue of state law for the *Pullman* doctrine to apply.

2. Whether the Fifth Circuit erred in reversing the district court's refusal to abstain in favor of a preexisting state court proceeding filed by the Attorney General in light of the district court's unchallenged finding that the Attorney General had filed the state court proceeding in bad faith and in retaliation for the Petitioners' exercise of fundamental First Amendment rights.

3. Whether the Fifth Circuit abused its discretion by ordering the district court to abstain under the *Pullman* doctrine rather than certifying any unsettled issues of state law directly to the Texas Supreme Court as provided for under Texas law.

LIST OF ALL PARTIES

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Martha Phillips Tilton
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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. The *Pullman* Abstention Standard Applied by the Fifth Circuit Conflicts With the Standard Announced by this Court and is Inconsistent With the Standards Applied by Other Circuit Courts 7

II. This Case Presents the Court With an Opportunity to Fashion a Precise Standard for the Degree of Uncertainty Necessary in State Law to Justify the Application of *Pullman* Abstention 11

III. The Fifth Circuit's Holding That the Bad Faith Exception to *Younger* Abstention is Irrelevant to *Pullman* Abstention Profoundly Misconstrues the Nature of the Bad Faith Exception and the Relationship Between the *Younger* and *Pullman* Doctrines 14

IV. The Fifth Circuit Abused Its Discretion by Ordering Abstention Rather Than Certifying Any Ambiguous Issues of Texas Law Directly to the Texas Supreme Court Pursuant to Texas Rule of Appellate Procedure 114 17

TABLE OF CONTENTS – Continued

Page

CONCLUSION 21

APPENDIX ..... App. i

TABLE OF AUTHORITIES

Page

CASES

American Trial Law. Ass'n, N.J. Branch v. New Jersey S. Ct., 409 U.S. 467, 93 S.Ct. 627 (1973) 19

Bellotti v. Baird, 428 U.S. 132, 96 S.Ct. 2857 (1976) 18

City of Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502 (1987) 8, 18, 20

England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461 (1964) 20, 21

Harman v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177 (1965) 8

Harris County Comm'rs Court v. Moore, 420 U.S. 77, 95 S.Ct. 870 (1975) 19

Hawaii Hous. Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321 (1984) 8

Lehman Bros. v. Schein, 416 U.S. 386, 94 S.Ct. 1741 (1974) 18

Pearl Inv. Co. v. City of San Francisco, 774 F.2d 1460 (9th Cir. 1985) 13

Pennzoil v. Texaco, 481 U.S. 1, 107 S.Ct. 1519 (1987) 16, 17

Pietzsch v. Mattox, 719 F.2d 129 (5th Cir. 1983) 9

Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800 (1974) 8, 20

Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941) 3

Stephens v. Bowie County, 724 F.2d 434 (5th Cir. 1984) 9

TABLE OF AUTHORITIES – Continued

Page

United Fence & Guard Rail Corp. v. Cuomo, 878 F.2d 588 (2d Cir. 1989) 9, 13

Virginia v. American Booksellers Ass'n., 484 U.S. 383, 108 S.Ct. 636 (1988) 18

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971) ... 3, 16

Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391 (1967) 20

STATUTES

28 U.S.C.A. § 1254(1) (Supp. 1993) 2

42 U.S.C.A. § 1983 (1981) 5

Article 1302, Chapter 5, Texas Miscellaneous Corporation Laws Act 4, 5, 6

Tex. R. App. P. 114 17

Texas Deceptive Trade Practices – Consumer Protection Act, Tex. Bus. & Com. Code § 17.41 *et seq* 4, 5, 6, 10

TREATISES

Erwin Chemerinsky, *Federal Jurisdiction* (1989) 12

Charles A. Wright, *Law of Federal Courts* (1983) 18

17A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (2d ed. 1988) 12, 13, 19

LAW REVIEW ARTICLES

David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. Chi. L. Rev. 268 (1969) 3

TABLE OF AUTHORITIES – Continued

Page

Julie A. Davies, *Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. Davis L. Rev. 1 (1986) 3, 12, 13

Martha A. Field, *Abstention in Constitutional Cases: The Scope of Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071 (1974) 13

Martha A. Field, *The Abstention Doctrine Today*, 125 U. Pa. L. Rev. 590, 602-03 (1977) 12

Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984) 3

Peter H. Barber, *Pullman Abstention: A Discussion of Issues and Strategies*, 1983 Clearinghouse Rev. 1093 ..... 12, 13

Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321 11

Richard B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. Rev. 888 (1971) 3

Theodore B. Eichelberger, *Certification Statutes: Engineering a Solution to the Pullman Abstention Delay*, 59 Notre Dame L. Rev. 1339 (1984) 3

Thomas G. Buchanan, *Pullman Abstention: Reconsidering the Boundaries*, 59 Temp. L.Q. 1243 (1986) 3, 11, 12

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

United States Constitution, Amendment I ..... *passim*

United States Constitution, Amendment XI 2

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WORD OF FAITH WORLD OUTREACH CENTER CHURCH, INC., ET AL.,

Petitioners,

v.

DAN MORALES, Attorney General of Texas,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Word of Faith World Outreach Center Church, Inc. (the "Church"), Robert Tilton and Martha Phillips Tilton (the "Tiltons") pray that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 986 F.2d 962 (5th Cir. 1993), is attached hereto as Appendix A, App. 1-18. The opinion

of the United States District Court for the Western District of Texas, reported at 787 F. Supp. 689 (W.D.Tex. 1992), is attached hereto as Appendix D, App. 23-63.

JURISDICTION

The opinion of the Fifth Circuit in this case was issued on March 29, 1993. (See Appendix A, App. 1-18) An order denying Appellees' Motion for Rehearing before the Fifth Circuit was issued on April 26, 1993. (See Appendix C, App. 21-22) The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1254(1) (Supp. 1993).

STATUTORY PROVISIONS INVOLVED

Although the proceedings below involved the First and Eleventh Amendments to the United States Constitution and various provisions of Texas law, this Petition presents issues pertaining only to the proper application of *Pullman* abstention which is a non-statutory, court-made procedural doctrine. The Texas certification rule, Texas Rule of Appellate Procedure 114, is implicated in this Petition. Because Rule 114 is somewhat lengthy, its text is set out in Appendix E, App. 64-66.

STATEMENT OF THE CASE

This case involves the *Pullman*[1] abstention doctrine, the limits on its use, the need for a uniform standard for determining when its use is appropriate, its relationship to other species of abstention – namely the *Younger*[2] doctrine – and its continued viability when direct state supreme court certification of uncertain state law issues is available. In short this case presents the Court with the opportunity to thoroughly examine one of the most controversial of all court-made procedural doctrines.[3]

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[1] *Pullman* abstention is so named after *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941), the case in which the doctrine was initially articulated.

[2] *Younger* abstention takes its name from *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), the case in which that doctrine was first expostulated.

[3] Each of the articles and treatises cited in this Petition is, to some extent, critical of the *Pullman* abstention doctrine. Some commentators advocate its abolition altogether. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984); David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. Chi. L. Rev. 268, 317 (1969). Others propose additional limitations on its application. *See* Thomas G. Buchanan, *Pullman Abstention: Reconsidering the Boundaries*, 59 Temp. L.Q. 1243 (1986); Julie A. Davies, *Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. Davis L. Rev. 1 (1986). Still others propose that its use be discontinued when direct state court certification is available. *See* Theodore B. Eichelberger, *Certification Statutes: Engineering a Solution to the Pullman Abstention Delay*, 59 Notre Dame L. Rev. 1339 (1984); Richard B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. Rev. 888 (1971).

The backdrop for this proposed examination is provided by an extraordinary set of facts. This case was precipitated when the Attorney General of Texas attempted to suppress the religious teachings of what he acknowledges to be a bona fide church (App. 24, n.1) because he found them detrimental to the people of Texas. After waging war against Petitioners in the media, the Attorney General, claiming authority under the Texas Deceptive Trade Practices – Consumer Protection Act, Tex. Bus. & Com. Code § 17.41 *et seq* (the "DTPA"), demanded that the Church turn over documents which the district court found to be clearly protected by the United States Constitution. (App. 46) In reaction to this demand, the Church notified the Attorney General that it would seek protection through a federal court suit. (App. 26) To compel the Church to turn over these documents and, as the district court later found, to prevent the acquisition of federal jurisdiction (App. 31), the Attorney General filed a *quo warranto* proceeding in state court in which he sought the revocation of the Church's charter, the appointment of a receiver over its assets, and a permanent injunction against all operations of the Church. (App. 27) The Attorney General sought this draconian relief pursuant to Article 1302, Chapter 5, Texas Miscellaneous Corporation Laws Act (the "MCLA"). (*Id.*) The *quo warranto* action is still pending in the Probate Court of Travis County, Texas.[4]

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[4] A more detailed account of the somewhat complex sequence of events that led to the filing of Petitioner's federal complaint is provided in Appendix F, App. 67-72.

Two days after the Attorney General filed his *quo warranto* proceeding which threatened the very existence of the Church, Petitioners filed this action in federal district court pursuant to 42 U.S.C.A. § 1983 (1981), contending that the Attorney General's actions violated the First Amendment to the United States Constitution and seeking an injunction to prevent the Attorney General from attempting to enforce his document demand and from prosecuting his *quo warranto* proceeding.

Following a two day trial, the district court held that: (i) Texas law was "clear" that the DTPA, the claimed source of authority for the document demand, was not applicable to an entity, like the Church, that sold nothing and was in no way involved in trade or commerce (App. 38), (ii) the application of the DTPA to the Church violated the Establishment Clause of the First Amendment (App. 51-53), (iii) the Attorney General's demand that the Church turn over all of its sensitive documents, including tapes of all of its sermons and a list of its members, violated the Free Exercise Clause and the Freedom of Association Clause of the First Amendment (App. 46), and (iv) the application of the MCLA, the claimed source of authority for the filing of the *quo warranto* suit, to the Church violated the Church's rights under the First Amendment because the "remedies provided under the MCLA and sought by the Attorney General would wholly deprive the Plaintiffs of their right to worship" (App. 54-55). Based on these findings, the district court permanently enjoined the *quo warranto* proceeding and the Attorney General's attempts to obtain constitutionally protected documents from the Church. (App. 62-63)

The district also court rejected the Attorney General's request that it abstain under either the *Younger* or *Pullman* abstention doctrines because it found that the Attorney General's actions against the Church, including the filing of the *quo warranto* proceeding, were taken in bad faith. (App. 32) The district court also expressly found that the Attorney General had filed his *quo warranto* action for the purpose of retaliating against the Petitioners' exercise of their First Amendment rights. (App. 33-34)

On appeal the Fifth Circuit ruled that the district court should have abstained pursuant to the *Pullman* doctrine. The court reached this result based solely on its conclusion that the case turned on state law issues that are "fairly susceptible to an interpretation that might avoid or substantially modify the federal constitutional question." (App. 11-12) The court did not determine that the state statutes involved, the DTPA and the MCLA, were ambiguous or uncertain. Indeed, with respect to the DTPA, the Fifth Circuit concluded that it was "highly likely" that the district court's finding that the DTPA did not apply to the Church was correct. (App. 14) With respect to the MCLA, the Fifth Circuit noted that none of the exceptions to its application included churches or religious corporations (App. 14, n.8), but concluded that "nonetheless, a state court might impose a limiting construction on the statute." (*Id.*) The Fifth Circuit's own conclusions, therefore, indicate that no real uncertainty exists regarding the application of the two state statutes to the Church – the DTPA does not apply and the MCLA does.

Although the district court found that the Attorney General filed the *quo warranto* proceeding in bad faith and

to retaliate for Petitioners' exercise of their First Amendment rights, the Fifth Circuit nevertheless held that the bad faith exception to the *Younger* abstention doctrine is irrelevant for the purposes of *Pullman* abstention. (App. 17, n.10) Indeed, the Fifth Circuit supported its decision to abstain under the *Pullman* doctrine based on the existence of the pending *quo warranto* proceeding. (App. 18, n.12)

In their Motion for Rehearing the Petitioners requested that the court not only reconsider its holding on *Pullman* abstention but also, alternatively, that it certify any ambiguous issues of state law directly to the Texas Supreme Court pursuant to the Texas certification rule. The Fifth Circuit denied Petitioners' Motion for Rehearing without comment.

REASONS FOR GRANTING THE WRIT

I. The *Pullman* Abstention Standard Applied by the Fifth Circuit Conflicts With the Standard Announced by this Court and is Inconsistent With the Standards Applied by Other Circuit Courts.

The standard developed by the Fifth Circuit and applied in this case to determine the applicability of *Pullman* abstention omits the most critical element of the *Pullman* doctrine. This Court has repeatedly held that the application of the *Pullman* abstention doctrine is appropriate only if two elements are satisfied: (1) the state statute at issue must be uncertain, unsettled, or ambiguous *and* (2) it must be fairly subject to an interpretation which will render unnecessary or substantially modify

the federal constitutional question. *City of Houston v. Hill*, 482 U.S. 451, 468, 107 S.Ct. 2502, 2513 (1987); *Hawaii Hous. Authority v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327 (1984); *Harman v. Forssenius*, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182 (1965). The first element of the standard – that the issue of state law involved be uncertain, unsettled, or ambiguous – is an absolute prerequisite for the application of the *Pullman* doctrine. *City of Houston v. Hill*, 482 U.S. at 469, 107 S.Ct. at 2514 ("when a statute is not ambiguous, there is no need to abstain even if state courts have never interpreted the statute") and *Procunier v. Martinez*, 416 U.S. 396, 402-03, 94 S.Ct. 1800, 1806 (1974) (unsettled state law is "the essential prerequisite for abstention").

The standard developed by the Fifth Circuit directly conflicts with this Court's holdings by requiring the presence of only *one* of these elements as a prerequisite for the application of the *Pullman* doctrine:

> In order to apply the [*Pullman*] abstention doctrine, the district court must be convinced that *at least one* of three factors is present:
>
> (1) Whether the disposition of a question of state law involved in the case can eliminate or narrow the scope of the federal constitutional issue;
>
> (2) Whether the state law question presents difficult, obscure or unclear issues of state law; *or*
>
> (3) Whether a federal decision could later conflict with subsequent state court resolutions concerning the same regulatory program or scheme, thus engendering more confusion.

(Emphasis added) *Stephens v. Bowie County*, 724 F.2d 434, 435 (5th Cir. 1984).[5] *See* also *Pietzsch v. Mattox*, 719 F.2d 129, 131 (5th Cir. 1983). Because only one of these three factors need be present, under the Fifth Circuit's standard a federal court can abstain under the *Pullman* doctrine if the resolution of the state law issue involved will narrow or eliminate the federal constitutional issue – even if the state law is not uncertain or ambiguous. That was the precise result in the instant case. The Fifth Circuit abstained solely on its conclusion that the Texas statutes at issue were fairly subject to an interpretation which would moot the federal constitutional claims brought by Petitioners. (App. 12) ("The question thus presented is whether the statutes at issue here apply full force to the church or are susceptible of a limiting construction that would alleviate the unconstitutional burdens the district court found they imposed on the church.") The Fifth Circuit did not examine the statutes at issue to determine if their application to the facts of this case was uncertain under Texas law. On the contrary, the court endorsed the

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[5] This standard should be compared to the standard adopted by the Second Circuit:

> The *three* basic conditions that *must* be present to trigger *Pullman* abstention reflect the policies that underlie the doctrine: First, the state statute must be unclear or the issue of state law uncertain; second, resolution of the federal issue must depend upon the interpretation given to the ambiguous state provision; *and* third, the state law must be susceptible of an interpretation that would avoid or modify the federal constitutional issue.

(Emphasis added) *United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 594 (2d Cir. 1989).

district court's finding that Texas law was "clear" that the DTPA could not be applied to the Church:

> It is highly likely, as the district court noted, that the DTPA does not even apply to the church. Significantly, it is the DTPA that provides the Texas Attorney General with the investigative authority upon which the objectionable January 13, 1992, demand letter was predicated. A state court ruling to the effect that the DTPA does not apply to the church plainly would moot any federal constitutional claim, at least insofar as it was premised upon the application of the DTPA.

(App. 14) The Fifth Circuit would thus force the parties to relitigate this issue in state court even though the district court has already resolved it and the Fifth Circuit found it "highly likely" that the district court's resolution was correct. This pointless result wastes judicial resources and does not serve the policies underlying the *Pullman* doctrine.

Commentators have noted that the *Pullman* abstention standard applied by the Fifth Circuit is inconsistent with the purpose of the *Pullman* doctrine and with Supreme Court precedent:

> The approach taken by the Fifth Circuit clearly demonstrates a failure to perceive the purposes of the Supreme Court in establishing the *Pullman* abstention doctrine . . . [The Fifth Circuit's] approach has the potential to extend the scope of *Pullman* abstention far beyond its limited function and purpose. By requiring only one of the Supreme Court's triggering elements must be met before abstention is ordered, the Fifth Circuit acts counter to precedent established by the Supreme Court.

Footnotes omitted. Buchanan, *supra*, at 1255-56.[6] *See* also Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 340-41 (concluding that the Fifth Circuit's *Pullman* standard allows application of the doctrine to a far wider range of cases than does the standard used in the Second Circuit). The Court should grant writ in this case to correct the erroneous and widely criticized *Pullman* abstention standard applied by the Fifth Circuit.

II. This Case Presents the Court With an Opportunity to Fashion a Precise Standard for the Degree of Uncertainty Necessary in State Law to Justify the Application of *Pullman* Abstention.

The Court should grant writ in this case in order to formulate a consistent standard for determining the extent to which state law must be unclear in order to trigger the application of *Pullman* abstention. Although the Court has consistently required the presence of an unclear or ambiguous issue of state law as a prerequisite for abstention under the *Pullman* doctrine, virtually every commentator who has addressed *Pullman* abstention has bemoaned the fact that the Court has failed to articulate a consistent standard for the degree of ambiguity necessary to render abstention appropriate. *See*, e.g., 17A Charles A.

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[6] After noting "substantial disparity among the circuits" in the application of the *Pullman* doctrine, the author concluded that the *Pullman* standard applied by the Second Circuit is consistent in furthering the purposes of the Supreme Court. *Id.* at 1252. The Second Circuit standard is set out above at note 5.

Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4242 at 42 (2d ed. 1988) ("The Court has not defined with precision what degree of unclarity in state law is needed to justify *Pullman*-type abstention"); Erwin Chemerinsky, *Federal Jurisdiction* § 12.2.1 at 599 (1989) (the "Supreme Court has offered relatively little guidance about how unclear the state law must be [to trigger *Pullman* abstention"]); Buchanan, *supra*, at 1251 ("the lack of a concise, workable definition of the proper circumstances in which to apply *Pullman* abstention provides the lower federal courts with little in the way of guidance"); Davies, *supra*, at 7 ("Commentators have noted the existence of different shades of 'unclarity' and the uncertainty of how unclear state law must be to justify abstention"); Peter H. Barber, *Pullman Abstention: A Discussion of Issues and Strategies*, 1983 Clearinghouse Rev. 1093 at 1097 n.49 (reviewing the varying standards announced by the Court for the necessary degree of ambiguity in state law to trigger *Pullman* abstention).

Some commentators have suggested that the lack of a precise standard for the degree of unclarity in state law necessary to trigger the *Pullman* doctrine has led to abuse of the doctrine by lower courts. *See* Wright, Miller & Cooper, *supra*, § 4242 at 43-44 ("Indeed the standard on when state law is sufficiently unclear to justify abstention is so amorphous that it has been suggested that decisions on whether to abstain may be shaped by the court's view of the substantive issues that the case presents," citing Martha A. Field, *The Abstention Doctrine Today*, 125 U. Pa. L. Rev. 590, 602-03 (1977), and Buchanan, *supra*, at 1251).

This case presents the Court with the opportunity to announce a precise standard for the degree of unclarity necessary to trigger the *Pullman* doctrine. Commentators have urged the adoption of a standard under which a federal court would abstain under *Pullman* only if the dispositive issue of state law involved is so unclear that the court would run a "substantial" risk of error in deciding it. Davies, *supra*, at 48 ("courts should confine *Pullman* abstention to those instances in which the underlying and potentially dispositive question of state law is so unclear that federal courts would run a substantial risk of error in deciding it"); Barber, *supra*, at 1097 ("the best view is that *Pullman* is appropriate only when the state law raises substantial doubt as to its correct interpretation").

In perhaps the most influential work dealing with *Pullman* abstention,[7] Professor Martha Field proposes a standard under which a federal court would abstain from deciding an issue of state law only when the state law is so unclear that the "chance of error is reasonably great." Martha A. Field, *Abstention in Constitutional Cases: The Scope of Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1090 (1974). The Field standard has already been adopted by the Second and the Ninth Circuits. *United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 595 (2d Cir. 1989); *Pearl Inv. Co. v. City of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985).

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[7] Professors Wright, Miller and Cooper acknowledge Professor Field's 1974 article in the Pennsylvania Law Review to be the "outstanding work in the area of *Pullman* abstention." Wright, Miller & Cooper, *supra*, § 4244 at 81 n.44.

In this case the Fifth Circuit concluded that it was "highly likely" that the district court's interpretation of the primary state statute at issue in this case is correct. Based on this finding, the chances of the district court's interpretation of state law being in error cannot be "reasonably great." Under the Second and Ninth Circuit standards therefore, the Fifth Circuit's decision to abstain under *Pullman* was in error. The Court should grant the writ in this case in order to provide a consistent standard for determining whether state law is sufficiently unclear to trigger abstention under the *Pullman* doctrine.

III. The Fifth Circuit's Holding That the Bad Faith Exception to *Younger* Abstention is Irrelevant to *Pullman* Abstention Profoundly Misconstrues the Nature of the Bad Faith Exception and the Relationship Between the *Younger* and *Pullman* Doctrines.

The Fifth Circuit refused to accept the district court's conclusion that the Attorney General's bad faith filing of the state court *quo warranto* action rendered abstention in favor of that proceeding inappropriate under both the *Younger* and the *Pullman* doctrines. The reasoning applied by the Fifth Circuit in reaching this result treats *Younger* and *Pullman* abstention as two separate, unrelated doctrines and effectively reads the critical bad faith exception out of the *Younger* doctrine. The Fifth Circuit's reasoning is completely at odds with this Court's global approach to abstention.

The district court expressly found that seven different actions taken by the Attorney General against Petitioners, including the filing of the state court *quo warranto*

proceeding, constituted bad faith. (App. 29-30) Specifically, the district court found that the Attorney General had filed the state court proceeding in which he sought to strip the Church of its charter, appoint a receiver over its assets and enjoin its minister from conducting the business of the Church, for the purpose of retaliating against Petitioners for exercising their rights under the First Amendment. (App. 33-34) The district court concluded that these facts precluded the application of either *Younger* or *Pullman* abstention. (App. 32)

With little discussion, the Fifth Circuit peremptorily dismissed this basis for the district court's rejection of *Pullman* abstention:

> [W]e are persuaded that prosecutorial bad faith and harassment, although constituting a recognized exception to *Younger* abstention, possesses little or no relevance for *Pullman*-type situations.

(App. 17, n.10) In so holding, the Fifth Circuit completely misconstrues the nature of the bad faith/harassment exception to *Younger* abstention and the relationship between the various abstention doctrines. The bad faith exception to the *Younger* doctrine is premised on the conclusion that a bad faith state court proceeding filed by a state official for the purpose of retaliation or harassment is, in itself, a constitutional violation. Justice Stewart succinctly stated the rationale behind the bad faith exception to the *Younger* doctrine:

> [I]f there has been bad faith and harassment – official lawlessness – in a statute's enforcement- . . . the reasons of policy for deferring to state

> adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights.

Citations omitted. *Younger v. Harris*, 401 U.S. 37, 56, 91 S.Ct. 746 (1971) (J. Stewart, concurring). The existence of a state proceeding filed in bad faith by a state official must therefore constitute a valid basis for refusing to abstain not only under the *Younger* doctrine but also under the *Pullman* doctrine. Neither *Younger* nor *Pullman* abstention can justify forcing a party to endure an unconstitutional, bad faith state court proceeding.

The Fifth Circuit's holding also flies in the face of this Court's articulation of the interrelated nature of the two doctrines:

> [C]onsiderations similar to those that mandate *Pullman* abstention are relevant to a court's decision whether to abstain under *Younger*. The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases.

Citations omitted. *Pennzoil v. Texaco*, 481 U.S. 1, 11 n.9, 107 S.Ct. 1519, 1526 n.9 (1987). In this case the Fifth Circuit has ruled that a consideration fundamental to the *Younger* doctrine is completely irrelevant to the *Pullman* doctrine. Indeed, the Fifth Circuit actually relies on the existence of the *quo warranto* proceeding as a consideration supporting its application of *Pullman* abstention. (App. 18, n.12 (existence of a pending state court proceeding in which issues of state law may be resolved

supports application of *Pullman* doctrine)) By expressly approving the continuation of the state court proceeding, the Fifth Circuit has effectively stripped the *Younger* doctrine of its bad faith exception, endorsed the Attorney General's bad faith efforts to thwart federal jurisdiction and retaliate against Petitioners' exercise of their First Amendment rights, and, perhaps most ironically, has well illustrated the intrinsic error, rejected by this Court in *Pennzoil*, of treating *Younger* and *Pullman* abstention as unrelated doctrines. This Court should grant writ to reaffirm its holding in *Pennzoil* and correct the Fifth Circuit's "pigeonhole" approach to abstention.

IV. The Fifth Circuit Abused Its Discretion by Ordering Abstention Rather Than Certifying Any Ambiguous Issues of Texas Law Directly to the Texas Supreme Court Pursuant to Texas Rule of Appellate Procedure 114.

Rather than force Petitioners to endure a state court proceeding brought in bad faith for the purpose of relitigating facts already found by the district court, the Court of Appeals should have simply certified any unclear questions of state law directly to the Texas Supreme Court. Texas Rule of Appellate Procedure 114 allows the Court of Appeals to certify to the Texas Supreme Court any unsettled questions of Texas law. (App. 64-66)

This Court has enthusiastically endorsed the use of certification as an alternative to *Pullman* abstention when

direct certification is available.[8] *Virginia v. American Booksellers Ass'n.*, 484 U.S. 383, 396, 108 S.Ct. 636, 644 (1988) ("Certification, in contrast to the more cumbersome and (in this context) problematic abstention doctrine, is a method by which we may expeditiously obtain [an authoritative construction of state law]"); *City of Houston v. Hill*, 482 U.S. at 470, 107 S.Ct. at 2514 ("the certification procedure is useful in reducing the substantial burdens of cost and delay that abstention places on litigants"); *Bellotti v. Baird*, 428 U.S. 132, 150-51, 96 S.Ct. 2857, 2868 (1976) ("the availability of an adequate certification procedure 'does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism,' " quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744 (1974)).

Certification, as opposed to *Pullman* abstention, is particularly appropriate in this case because it is the only method by which federal jurisdiction may be retained

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[8] Commentators are virtually unanimous in strongly preferring certification to the much more burdensome *Pullman* abstention doctrine. *See*, e.g., Charles A. Wright, *Law of Federal Courts* § 52 at 315 (1983):

> Although there is still disagreement on the desirability of certification in cases of unclear state law, there is no such disagreement about the value of certification in situations of the *Pullman* type. The state law questions that are intertwined with federal constitutional issues in *Pullman*-type cases can be resolved more expeditiously by certification than by the traditional method of requiring a party to commence a declaratory judgment action in the state trial court and take the decision there to the highest court of the state.

pending the resolution of any ambiguous state law issues. When issues of Texas law are involved, a federal court applying the *Pullman* doctrine cannot follow the procedure mandated by this Court and retain jurisdiction pending the outcome of proceedings in state court. *American Trial Law. Ass'n, N.J. Branch v. New Jersey S. Ct.*, 409 U.S. 467, 469, 93 S.Ct. 627, 629 (1973). Instead, the federal court must dismiss the proceeding, leaving the federal plaintiffs to refile in federal court when and if proceedings in state court are concluded. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 88 n.14, 95 S.Ct. 870, 875 n.14 (1975). As pointed out in Wright and Miller, direct certification to the Texas Supreme Court, which became available in 1987, now allows federal courts to discontinue this "highly artificial practice." Wright, Miller & Cooper, *supra*, § 4243 at 66-67.

The ramifications of the district court's inability to retain jurisdiction in this case are of critical significance. First, the district court will not be able to grant any form of interim relief to protect Petitioners' federal constitutional rights pending state court resolution of the state law issues involved. Under the circumstances of this case – a state attorney general misusing the power of his office in an attempt to suppress the First Amendment rights of an acknowledged, bona fide church – the inability of the district court to grant interim relief is crucial. Second, because the federal suit must be dismissed, Petitioners lose the benefit of the district court's determination of

fact issues.[9] This Court has expressly rejected that result. *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 417, 84 S.Ct. 461, 466 (1964) ("in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination").

Finally, the fact that Petitioners' federal suit must be dismissed will significantly add to the expense and delay associated with the application of the *Pullman* doctrine in this case. If the Texas courts resolve state law so that the constitutional issues already decided by the district court are not mooted, Petitioners will be forced to start over again in the district court by refiling and relitigating their federal constitutional claims. This result would greatly exacerbate the delay and expense attendant upon the application of *Pullman* abstention.[10]

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[9] This case is tailor-made for certification because all fact findings necessary to the resolution of any state law issues have already been made by the district court. These findings of fact have gone unchallenged by the Attorney General. Certification therefore would not be complicated by the necessity of any additional fact finding.

[10] The delay that would be caused by the application of the *Pullman* doctrine in this case is particularly serious due to the fundamental nature of First Amendment rights involved. This Court has repeatedly expressed an unwillingness to apply *Pullman* abstention with its attendant delays when fundamental rights, particularly First Amendment rights, are at issue. *City of Houston v. Hill*, 482 U.S. at 467-68, 107 S.Ct. at 2513; *Procunier v. Martinez*, 416 U.S. at 404, 94 S.Ct. at 1807; *Zwickler v. Koota*, 389 U.S. 241, 252, 88 S.Ct. 391, 397 (1967).

The use of certification would also avoid the procedural balancing act required of Petitioners to preserve their federal constitutional claims for federal court. *See England v. Louisiana Bd. of Medical Examiners*, 375 U.S. at 420, 84 S.Ct. at 467 (setting out requirement that *Pullman* plaintiff submit federal constitutional claims to state court so that court may construe state law in "light of those claims," but must at the same time reserve those claims to avoid later res judicata preclusion in federal court).

Even though certification is a singularly appropriate alternative to abstention under the facts of this case, the Fifth Circuit refused Petitioners' request that any uncertain issues of Texas law be certified to the Texas Supreme Court. That refusal, under the circumstances present here, was an abuse of discretion. This Court should enforce its long-standing preference for certification over abstention by requiring the Court of Appeals to certify any questions of Texas law directly to the Texas Supreme Court.[11]

CONCLUSION

The jurisprudence surrounding the *Pullman* abstention is currently in a state of disarray. This disarray is illustrated by the Fifth Circuit's holding in this case. The

[11] It should be noted that under the Texas certification statute only this Court or the Fifth Circuit can certify questions in this case. The district court cannot do so. (App. 64)

Fifth Circuit reached its conclusion that *Pullman* abstention was appropriate in this case only by using an erroneous, widely-criticized standard that conflicts with the standard applied by other circuit courts, and by concluding that the bad faith use of state law by a state official for the purpose of deterring Petitioners from exercising their constitutional rights, while critical to the *Younger* doctrine, is irrelevant to the *Pullman* doctrine. Finally, by flatly refusing to certify any ambiguous issues of state law directly to the Texas Supreme Court, the Fifth Circuit ignored the extraordinary costs of abstaining in this case and further ignored this Court's repeated exhortations to use certification, when available, as an alternative to abstention. This case presents the Court with a golden opportunity to clarify and impose consistency on the use of *Pullman* abstention.

For the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the Court of Appeals for the Fifth Circuit.

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Appendix Table of Contents

Appendix A

Opinion of United States Court of Appeals for the Fifth Circuit, Dated March 29, 1993 .....App. 1

Appendix B

Judgment of United States Court of Appeals for the Fifth Circuit, Dated March 29, 1993 .....App. 19

Appendix C

Opinion on Petition for Rehearing to United States Court of Appeals for the Fifth Circuit, Dated April 26, 1993 .....App. 21

Appendix D

Opinion of the United States District Court for the Western District of Texas, Dated March 18, 1993 .....App. 23

Appendix E

Texas Rule of Appellate Procedure 114: Certification of Questions of Law by United States Courts .....App. 64

Appendix F

Detailed Factual Background of This Case....App. 67

APPENDIX A

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, INC.,
Plaintiffs-Appellees,

v.

Dan MORALES, Attorney General of Texas,
Defendant-Appellant.

No. 92-8178.

United States Court of Appeals,
Fifth Circuit.

March 29, 1993.

Texas Attorney General filed quo warranto petition in state court to compel church to produce records and to obtain forfeiture of charter, dissolution of corporation, and appointment of receiver. Church and its leaders sought injunction in federal court seeking determination of rights and privileges. The United States District Court for the Western District of Texas, Sam Sparks, J., 787 F.Supp. 689, entered injunction against Attorney General, and he appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) Eleventh Amendment immunity did not bar action by church and its leaders, and (2) *Pullman* abstention was required.

Reversed and remanded.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The Texas Attorney General appeals the district court's injunction permanently prohibiting him from attempting to obtain certain records and documents from the Word of Faith Family Church ("Word of Faith") and enjoining him from further prosecuting the state court action in which he sought them. In a diligent and well-intentioned effort to resolve the competing considerations, the district court found that the Attorney General's threatened investigation violated the church's First Amendment associational and religious freedoms. Because we discern certain unsettled state law issues, the resolution of which may render moot the federal constitutional claims, we conclude that the district court should have abstained from the exercise of jurisdiction under the doctrine enunciated in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

I.

Word of Faith is a church founded in 1976 as a Texas nonprofit corporation. Its professed beliefs apparently do not include a vow of poverty: With 12-13,000 members and some 500,000 people on its mailing list, Word of Faith grossed $65 million in revenues in 1991 on an operating budget of $50 million.[1]

On November 21, 1991, the American Broadcasting Company aired a *Prime Time Live* television program unflattering to both the church and its pastor, the Reverend Robert Tilton (collectively, with Mrs. Tilton, the

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[1] The parties have stipulated that Word of Faith is a bona fide church holding sincere religious beliefs.

"church"). The program put forth against the church essentially four accusations: that the church was run as a sole proprietorship and that the Reverend and Mrs. Tilton therefore had direct access to church funds; that the church falsely represented that it provided financial support to a Haitian orphanage; that the church had sent out vials of holy water purporting to be from the Red Sea that in fact were from Taiwan; and that prayer requests solicited by Reverend Tilton never reached him but in fact were thrown into the garbage by the bank that processes the church's mail and deposits its contributions.

After the program aired, the church's attorney wrote to both federal and state governmental agencies, including the Texas Attorney General, and offered to meet with them and to permit review and inspection of the church's records for the purpose of satisfying the governmental agencies that the allegations made on *Prime Time Live* were false. The Attorney General declined this invitation; the United States Postal Service and the Federal Bureau of Investigation accepted.

On January 13, 1992, the Consumer Protection Division of the Office of the Attorney General faxed to the church a demand for documents pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), TEXAS BUS. & COM. CODE ANN. § 17.41 *et seq.* Upon receipt of the demand letter, the church again requested a meeting with the Attorney General and his personnel, which the Attorney General again refused. Thereafter, pursuant to an oral request, the Attorney General's office remitted the January 13, 1992, document demand to the print and television media.

The publication of the Attorney General's document demand letter resulted in further unfavorable publicity to the church, apparently prompting it to harden its position and to decline any further cooperation with the Attorney General. Even so, the church yet again requested a meeting with the Attorney General at which counsel for the church represented, both orally and in writing, that if the Attorney General could convince his "clients" that their records should be examined, the records would be made available. The Attorney General again declined the meeting. The church's counsel then advised the Attorney General of his intention to file a lawsuit in federal court on February 6, 1992.

On February 5, 1992, five days before the deadline specified in the January 13th demand letter, the Attorney General filed a petition *in quo warranto* in the Probate Court of Travis County, Texas, pursuant to his authority under the Miscellaneous Corporation Laws Act ("MCLA"), TEX.REV.CIV.STAT.ANN. art. 1302-5.05. The Attorney General sought not only to compel production of the records he had requested but also, as his pleadings indicated, "forfeiture of [the church's] charter and dissolution of the corporation and appointment of a Receiver to take possession of the affairs of the corporation and appointment of a Receiver to take possession of the affairs of the [church], to rehabilitate, reorganize, conserve or liquidate the affairs of the corporation," as well as a "Permanent Injunction against the [church], its officers, directors, stockholders, agents, employees, and representatives whomsoever from conducting any business of the [church], and from disposing of or concealing in

any manner or any way the property or other assets of any kind or nature whatsoever of the [Church]."[2]

On February 7, the day after the probate court issued its show cause order and scheduled the matter for hearing on March 9, 1992, the church filed its lawsuit in the Western District of Texas.[3] The district court that same day issued a Temporary Restraining Order to halt the state court proceedings; on March 18, 1992, it issued its Memorandum Opinion and Order enjoining the Attorney General from attempting to obtain the church's documents and records or from further prosecuting the state court *quo warranto* proceeding. The Attorney General appeals.

II.

We review the district court's order for abuse of discretion and reverse if the order was based upon an erroneous legal standard or clearly erroneous factual findings. *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1062 (9th Cir.1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1951, 118 L.Ed.2d 555 (1992). The

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[2] The documents requested by the Attorney General in his original, January 13, 1992, document demand letter are summarized in the district court's published opinion. *See Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 787 F.Supp. 689, 699 (W.D.Tex.1992).

[3] On March 4, 1992, the Attorney General filed with the Travis County Probate Court his First Amended Petition and a modified document demand letter, both of which differed from the originals in certain material particulars. An important factor in our analysis, these alterations in the nature of the Attorney General's actions are discussed more fully below.

Attorney General argues that Eleventh Amendment immunity bars the action, the district court incorrectly applied First Amendment caselaw, and *Pullman* abstention compels the district court to abjure jurisdiction in favor of the state court proceeding.

It is beyond civil [sic] that the Eleventh Amendment generally bars suits in federal court by a citizen of a state against his state or a state agency or department. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984); *Hirtz v. Texas*, 974 F.2d 663, 665 (5th Cir.1992). The amendment does not, however, bar suits for injunctive relief against state officials. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

In *Young*, the Court upheld the issuance of an injunction against the Minnesota Attorney General, foreclosing his attempt to enforce a state statute alleged to violate the Fourteenth Amendment. Employing an analogy to *ultra vires* corporate acts, the Court held that the unconstitutional statute was effectively void and therefore could not confer immunity upon a state official. Since the state could not constitutionally authorize the Attorney General's action, the Attorney General was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." *Id.* at 160, 28 S.Ct. at 454. Although the logic of *Young* has not been extended to suits seeking relief in the form of money damages or "equitable restitution," *see Edelman v. Jordan*, 415 U.S. 651, 664-68, 94 S.Ct. 1347, 1356-58, 39 L.Ed.2d 662 (1974), prospective injunctive relief may still be had by way of the *Young* fiction.

The Attorney General contends that the instant case fits within *Pennhurst's* holding that, consistent with the Eleventh Amendment, a federal court may not enjoin a state official to act in accordance with state law.[4] The Attorney General argues that, in determining that the Texas DTPA and MCLA afford the Attorney General no authority to conduct the sort of all-encompassing investigation of the church that was sought here and that the Attorney General thus was acting *ultra vires* his official capacity and therefore was subject to suit under *Young*, the district court construed state law, namely the DTPA and MCLA. Therefore, *Pennhurst* applies, and the district court had no authority to enjoin the state court proceeding.

The Attorney General's argument misconstrues *Pennhurst*. While the district court necessarily determined whether the church came within the provisions of the DTPA and MCLA (and therefore whether the Attorney

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[4] In *Pennhurst*, 465 U.S. at 106, 104 S.Ct. at 911, The Court stated that when a plaintiff alleges a state official's violation of *state* law,

> the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result directly conflicts with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

General had authority to investigate the church pursuant to the powers accorded him therein), this was primarily a determination antecedent to the court's finding that the Attorney General was acting in his individual capacity for purposes of Eleventh Amendment immunity. "Under existing law, federal courts must necessarily construe local law and administrative regulations to ascertain if there is a[n] interest protected by the federal constitution." *Patchette v. Nix*, 952 F.2d 158, 162 (8th Cir.1991). The Attorney General cannot push the *Young*-like square peg of the facts of this case into the round-holed immunity recognized in *Pennhurst*.

The court's alternative holding – that even if the DTPA and MCLA *did* permit the Attorney General to conduct such an intrusive investigation of the church, the statutes would violate the First Amendment as thus applied – underlines the fact that the ultimate basis for the suit was an alleged violation of *federal* law. This fact distinguishes the instant case from *Pennhurst*, where the Court expressly noted that "[n]o one questions that the petitioners in operating Pennhurst were acting in their official capacity." *Pennhurst*, 465 U.S. at 109 n. 17, 104 S.Ct. at 912 n. 17.[5] Here, the district court found the Attorney General was not acting in his official capacity.

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[5] This fact, the Court added, took the facts in *Pennhurst* out of that exception to Eleventh Amendment immunity provided where a state official's actions are unauthorized by state law. "Since it cannot be doubted that the statutes at issue here gave petitioners broad discretion in operating Pennhurst, the conduct alleged in this case would not be ultra vires. . . . " *Pennhurst*, 465 U.S. at 110-11, 104 S.Ct. at 913-14 (citations omitted). Thus, *Pennhurst* stands for the proposition that the Eleventh Amendment bars suit not, as the district court found here,

Moreover, nothing in *Penñhurst* supports the proposition that merely by construing Pennsylvania law to determine whether the defendants were acting in an official or individual capacity, the district court acted contrary to the Eleventh Amendment. Anytime a court declares a state statute unconstitutional, it first must determine just what the statute means. Such was the case in *Ex parte Young;* nothing the Attorney General has advanced persuades us that this case is distinguishable from the setting of that landmark decision. As the Supreme Court has stated, it is plain "that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689, 102 S.Ct. 3304, 3317, 73 L.Ed.2d 1057 (1982). Accordingly, our jurisdiction over this case is not barred by the Eleventh Amendment.

III.

Even though we rightfully may exercise jurisdiction in this case, we nonetheless may decline to do so in accordance with the discretionary doctrines of federal court abstention set forth in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Pullman*. *Younger* abstention is generally deemed appropriate where

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where the state official's actions are alleged to be *un*authorized by state law but where state law imposes an *affirmative* duty upon the official, and it is that duty that provides the basis for the injunctive relief sought.

assumption of jurisdiction by a federal court would interfere with pending state proceedings, whether of a criminal, civil, or even administrative character. *See, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12-14, 107 S.Ct. 1519, 1526-27, 95 L.Ed.2d 1 (1987) (federal courts may not enjoin state civil proceedings between private parties); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (extending *Younger* to state administrative proceedings involving important state interests).

Here, the district court repeatedly found that the Attorney General's sole purpose in filing the state court *quo warranto* proceeding was "to retaliate for or to deter the church and the Tiltons from exercising their constitutional rights in declining to furnish the documents and records demanded, and this 'retaliation' was a major motivating factor and played a prominent role in the Attorney General's decision to file the *quo warranto* proceedings." 787 F.Supp. at 694-95. This determination, the court concluded, brought the instant case within that narrow exception to *Younger* abstention in which a state court action is brought in bad faith or for a retaliatory motive. *See, e.g., Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir.1979); *Shaw v. Garrison*, 467 F.2d 113, 122 (5th Cir.), *cert. denied*, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972).

The Attorney General does not appeal the district court's refusal to abstain on *Younger* grounds, and

accordingly we are foreclosed from reviewing it.[6] *Pullman* abstention, however, is addressed to the inappropriateness of federal court resolution of difficult or unsettled questions of state law and the undesirability of reaching constitutional questions that might be mooted by the application of state law. *See Pullman*, 312 U.S. at 500, 61 S.Ct. at 645. The fact that *Younger* considerations might not be implicated on appeal, therefore, does not preclude the application of *Pullman's* differently-focused doctrine. *See Hodory*, 431 U.S. at 480 n. 11, 97 S.Ct. at 1904 n. 11.

We acknowledge that *Pullman* abstention is not necessarily proper whenever a state law question must be decided in order to reach the federal question. "Unless the state law in question is fairly susceptible of an interpretation that might avoid or substantially modify the federal constitutional question, federal courts should exercise their properly invoked jurisdiction." *O'Hair v. White*, 675 F.2d 680, 693 (Former 5th Cir.1982) (en banc); *see also County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959) (*Pullman* abstention appropriate "in cases presenting a federal

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[6] *See Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 & n. 10, 97 S.Ct. 1898, 1904 & n. 10, 52 L.Ed.2d 513 (1977) ("If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.") *Morales v. Trans World Airlines*, ___ U.S. ___, ___ n. 1, 112 S.Ct. 2031, 2036 n. 1, 119 L.Ed.2d 157 (1992) ("Petitioner [Attorney General of Texas] has not argued for abstention, and the federal-state comity considerations underlying *Younger* are accordingly not implicated."). For the above reason, we do not address the issue of whether the district court correctly applied the very narrow "bad faith or harassment" exception to *Younger*.

constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law").

IV.

The question thus presented is whether the statutes at issue here apply full-force to the church or are susceptible of a limiting construction that would alleviate the unconstitutional burdens the district court found they imposed upon the church. The district court found that application of the DTPA and MCLA to the church – inasmuch as these authorized the Attorney General's intrusive document demand – violated the church's First Amendment rights of free association, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61, 78 S.Ct. 1163, 1170-71, 2 L.Ed.2d 1488 (1958), and inextricably intertwined church and state in violation of the entanglement prong of the Establishment Clause test first enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

The district court's conclusion as to the DTPA's unconstitutionality as applied to the church was premised primarily upon the unconstitutionality of the Attorney General's demand for the church's membership and/or contributor lists – an obvious infringement of the First Amendment associational right announced in *NAACP v. Alabama*. *See Word of Faith*, 787 F.Supp. at 699-701.[7] In the

[7] The district court also faulted the Attorney General's document demand for its unreasonable and oppressive scope, "insofar as it requires the Plaintiffs to produce an enormous

district court's view, the DTPA also ran afoul of the Establishment Clause by virtue of the availability, under the statute, of injunctive relief and continuing jurisdiction to monitor the church's compliance with any injunction that might be entered against it. *Id.* at 701-02.

Essentially the same associational and excessive entanglement concerns underlay the district court's conviction that the MCLA also violated the church's First Amendment rights. The MCLA's investigative provisions authorize the Attorney General to inspect and investigate virtually any aspect of a corporation's activities, and it provides penalties for non-compliance with the Attorney General's request, including forfeiture of the corporate charter, injunctive relief to deny the right to transact business within the state, and fines and imprisonment of uncooperative corporate officers. *See id.* at 703-04.

We venture no opinion as to the correctness of the district court's decision on the constitutional merits, for we need not do so in order to apply the *Pullman* doctrine to the particulars of this case. The district court, despite its apparent conviction that the consumer-fraud DTPA statutes does *not* apply to the church, *see id.* at 696-98 & n. 7, nonetheless proceeded to address the federal constitutional issue *as if* the DTPA did apply. Likewise, the court found the state court receivership originally sought by

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amount of documents, which do not appear to have relevance to the alleged purpose of the investigation." *Word of Faith*, 787 F.Supp. at 699 n. 10. We do not understand the court to have made a constitutional ruling on this ground. Absent such a foundation, this issue was not properly before the court and is best resolved by the state trial court in the first instance.

the Attorney General pursuant to the MCLA to be an unconstitutional penalty as applied to the church, despite the court's recognition that the receivership provision was unavailable in the *quo warranto* proceeding. *Id.* at 703 n. 15.

In short, the unsettled questions regarding the application of state law in this case, depending upon how a state court would resolve them, could have mooted the federal constitutional issue. It is highly likely, as the district court noted, that the DTPA does not even apply to the church. Significantly, it is the DTPA that provides the Texas Attorney General with the investigative authority upon which the objectionable January 13, 1992, demand letter was predicated. A state court ruling to the effect that the DTPA does not apply to the church plainly would moot any federal constitutional claim, at least insofar as it was premised upon the application of the DTPA.

The district court did not discuss whether the MCLA properly applies to the church; we assume, *arguendo*, that it does.[8] Nonetheless, a state court might impose a limiting construction on the statute or find that the church's

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[8] Article 1302-1.03 B of the MCLA provides,

> Except to the extent that any provisions of this Act are expressly made inapplicable by any provision of the Texas Business Corporation Act, the Texas Non-Profit Corporation Act, or any special Statute of this State pertaining to a particular type of corporation, this Act shall govern (1) all domestic corporations, including without limitation those corporations heretofore or hereafter organized under any Statute of the State. . . .

None of the excepted statutes expressly limits the MCLA's application to churches or religious corporations.

March 30, 1992, voluntary dissolution of its corporate form mooted the Attorney General's investigation pursuant to the statute.[9]

Lastly, the district court found that the church did not qualify as a "charitable trust" within the meaning of TEX.PROP.CODE ANN. § 123.001 (Vernon's Supp.1992). We voice no opinion as to the correctness of this conclusion or its concomitant, that the Travis County Probate Court thereby was deprived of the jurisdiction provided by TEXAS PROBATE CODE ANN. § 5A(d) (West Supp.1993). *See Word of Faith*, 787 F.Supp. at 704-05 & n. 18. We do note, however, that this jurisdictional question presents yet another contested question of state law with the potential to moot the federal constitutional question. *Pullman* abstention was appropriate here, where " 'unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided' because 'the state courts may interpret [the] challenged state statute[s] so as to eliminate, or at least to alter materially, the constitutional question presented.' " *Pennzoil*, 481 U.S. at 29, 107 S.Ct. at 1535 (Blackmun, J., concurring) (citations omitted).

One last aspect of this case likewise materially alters or even eliminates the federal constitutional question, namely, the Attorney General's representations – tentatively before the district court, but with more force

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[9] In this regard, we note that the Attorney General's ability under the MCLA to dissolve the church's corporate charter and forfeit its right to do business in the state poses little threat when the church, by dissolving voluntarily, has beaten him to the punch.

before this panel at oral argument – that he no longer seeks to discover the church's membership or list of contributors, to have a receiver appointed to conduct the church's affairs, or to pursue imprisonment of church officers pursuant to the MCLA. The modified demand letter and amended state court petition, both dated March 4, 1992, reflect these changes in the Attorney General's position. Taken together, they address a substantial part, if not all, of the district court's constitutional qualms, and, in our opinion, dispel the "exceptional circumstances" justifying the district court's assumption of jurisdiction. *See Word of Faith*, 787 F.Supp. at 694.

The district court's apparent conclusion that an exception to *Pullman* abstention was presented by the "great and immediate" threat of irreparable injury to the church by the Attorney General's unconstitutional actions, *see id.*, was predicated upon the original state court petition and demand letter.[10] The amended petition

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[10] In its opinion, the district court discussed both *Pullman* and *Younger* abstention before concluding that an exception applies to both. According to the court, "[t]hese circumstances satisfy, in this Court's judgment, the requirements on exceptions to abstention of irreparable injury being 'great and immediate' and the conduct of the Attorney General as 'bad faith, harassment or any other unusual circumstance that would require equitable relief.' " 787 F.Supp. at 694.

We have discussed, *see supra* note 6, the bad faith and harassment exception to *Younger* abstention. The threat of "irreparable injury" generally excepts a case from the application of *Pullman* abstention "in the most extraordinary circumstances when fundamental rights such as voting rights are involved." *O'Hair v. White*, 675 F.2d at 694. *See also Procunier v. Martinez*, 416 U.S. 396, 404, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974) (facial challenge to statute under First Amendment justi-

and modified demand letter suggest there now exists no continuing constitutional violation sufficient to justify the exception to abstention, especially in light of the many unresolved state law issues in the case.

Therefore, abstention in this case is proper "to avoid unwarranted determination of federal constitutional questions. When federal courts interpret state statutes in a way that raises federal constitutional questions, 'a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time – thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.' " *Pennzoil*, 481 U.S. at 11, 107 S.Ct. at 1526 (quoting *Moore v. Sims*, 442 U.S. 415, 428, 99 S.Ct. 2371, 2379, 60 L.Ed.2d 994 (1979)). The muddled presentation of the issues in this case – the question of whether proper jurisdiction resides in the state trial court, whether the investigative powers provided the Attorney General by the DTPA and MCLA may be invoked against the church, and which state court petition and demand letter we should look to – should make apparent the danger of

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fies assumption of jurisdiction), *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed.2d 444 (1967) (same). We have reversed the district court's refusal to abstain under *Pullman* at least in part because we believe the Attorney General's modified request presents no continuing constitutional violation justifying the "extraordinary" exception to *Pullman* represented by these cases. We do not understand the district court to have rejected *Pullman* – as it did *Younger* – on the basis of the Attorney General's bad faith; indeed, we are persuaded that prosecutorial bad faith and harassment, although constituting a recognized exception to *Younger* abstention, possess little or no relevance for *Pullman*-type situations.

a federal court's interfering at too early a stage, only to promulgate an advisory opinion.[11] *Pullman* seems tailor-made for application to this case, where we must take care to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Pullman*, 312 U.S. at 500, 61 S.Ct. at 645.[12]

For the above reasons, we REVERSE and REMAND to the district court for an appropriate disposition in accordance with this opinion.

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[11] *See e.g. Pennzoil*, 481 U.S. at 11 n. 9, 107 S.Ct. at 1526 n. 9 ("In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised.") (Citing *Pullman*.)

[12] Lastly, we are persuaded that Word of Faith has, in the Texas court system, an adequate state forum in which to obtain a resolution of the state law issues while preserving its federal constitutional claims. *See Nissan Motor Corp. v. Harding*, 739 F.2d 1005, 1010-11 (5th Cir.1984) (discussing importance of availability of adequate state forum in abstention analysis). Indeed, the potential for a ready resolution of the church's claims in state court confirms us in our conclusion that *Pullman* abstention is warranted here. *See* 17A CHARLES A. WRIGHT, ET AL. FEDERAL PRACTICE AND PROCEDURE § 4242, at 60 (2d ed. 1988) ("A factor that will tip the scales in favor of abstention is if there is already pending a state court action that is likely to resolve the state questions without the delay of having to commence proceedings in state court.").

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8178

(Filed March 29, 1993)

D.C. Docket No. A 92 CA 89

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, INC., A CHURCH NON-PROFIT TEXAS CORPORATION, ET AL.,

Plaintiffs-Appellees,

versus

DAN MORALES, in his official capacity as Attorney General of the State of Texas, and Individually, ET AL.,

Defendants,

DAN MORALES, in his official capacity as Attorney General of the State of Texas, and Individually,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

March 29, 1993

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8178

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, INC., A CHURCH NON-PROFIT TEXAS CORPORATION, ET AL.,

Plaintiffs-Appellees,

versus

DAN MORALES, in his official capacity as Attorney General of the State of Texas, and Individually, Et Al.,

Defendants,

DAN MORALES, in his official capacity as Attorney General of the State of Texas, and Individually,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(April 26, 1993)

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX D

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, INC., a Church non-profit Texas corporation, Robert G. Tilton and Martha Phillips Tilton, Plaintiffs,

v.

Dan MORALES, in his official capacity as Attorney General of the State of Texas, Defendant.

Civ. No. A 92 CA 089.

United States District Court,
W.D. Texas,
Austin Division.

March 18, 1992.

Diane M. Henson, Graves, Dougherty, Hearon & Moody, Austin, Tex., J.C. Joyce, Joyce & Pollard, Tulsa, Okl., for plaintiffs.

Rose Ann Reeser, David Guillory, Texas Atty. General's Office, Austin, Tex., for defendant.

MEMORANDUM OPINION AND ORDER

SPARKS, District Judge.

This case involves serious issues of the rights of freedom of religion and of association under the First Amendment of the Constitution of the United States, Article 1 § 6 of the Texas Constitution, and the governmental rights of the State of Texas in enforcing its laws regarding non-profit corporations chartered under state law.

On November 21, 1991, ABC's *Prime Time Live* published a television network special involving, in part, the

Word of Faith World Outreach Center Church, Incorporated, and Robert G. Tilton, two of the three plaintiffs in this lawsuit. The import of this publication was not flattering to either the church or Mr. Tilton, but the accuracy or inaccuracy of the reporting is not relevant to the issues in this lawsuit.[1] Subsequent to November 21, 1991, the attorney representing Word of Faith World Outreach Center Church, Inc. and Robert G. Tilton, wrote federal and state governmental agencies, including the Attorney General of the State of Texas, and offered to meet with these governmental agencies and to permit review and inspection of the church's records for the purpose of satisfying the governmental agencies that the allegations made in *Prime Time Live* were false. The United States Postal Service and the Federal Bureau of Investigation accepted this offer, conferred with the attorney and were furnished with any records of the church requested, including financial records documenting the revenues and expenditures of the church. The Attorney General declined this invitation both initially and subsequently.

On January 13, 1992, the Consumer Protection Division of the Office of the Attorney General of Texas sent to the Plaintiffs, by facsimile transmission, a demand for documents pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act (Sec. 17.41, *et seq.*, of the

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[1] Likewise, the religious beliefs, practices and testimonies of Mr. and Mrs. Tilton for the Church and themselves are immaterial to the issues in this case as the Attorney General stipulated Word of Faith World Outreach Center Church, Inc. is a bona fide church holding sincere religious beliefs.

Texas Bus. & Com. Code of the State of Texas). The demand states in the first paragraph:

> The Consumer Protection Division of the Office of the Attorney General has reason to believe that Word of Faith Family Church and World Outreach Center . . . has engaged in trade practices and charitable solicitations which may violate provisions of state law including the Texas Consumer Protection and Deceptive Trade Practices Act. . . .

Both the nature and extent of the documents demanded were not reasonable and included documents clearly the Attorney General was not entitled to obtain from any religious organization and/or church.[2]

Upon receipt of the January 13, 1992, demand, the Plaintiffs, through their counsel, again requested a meeting with the Attorney General and his personnel, and, for reasons still unclear and unconvincing to the Court, the Attorney General and his personnel continued in their refusal to meet with the attorney representing the Word of Faith World Outreach Center Church, Inc. and Mr. and Mrs. Tilton. The church and Mr. and Mrs. Tilton clearly had First Amendment rights to assert to the demand for documents made on January 13, 1992, and did so on their own behalf and their members.

Thereafter, the Attorney General, following an oral request to do so, remitted, by facsimile transmission, the January 13, 1992, document demand to the press and

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[2] On January 13, 1992, the Attorney General and his staff well knew they were dealing ostensibly with a church and its minister and had to anticipate First Amendment problems.

television media. The Attorney General justifies this action by its own interpretation of Art. 6252-17a, V.A.T.S., and contends there was no choice but to deliver to the media this document notwithstanding the express terms of the statute under which the demand was made, which specified information obtained from such a request was confidential and could not be released except by court order.[3] The publication of the January 13, 1992, Attorney General demand to the media resulted in wide spread, unfavorable publicity to the church and Mr. Tilton. This action by the Attorney General had the overall effect of "hardening" the attitude of the church, the Tiltons, and their counsel against any cooperation with the Office of the Attorney General and the release of any documents whatsoever.

Notwithstanding, counsel for the church and the Tiltons again requested a meeting with the Attorney General and represented, orally and in writing, that, if the representatives of the Attorney General could convince his "clients" that records should be examined, the records would be made available. Again, the Attorney General declined any meeting. Counsel for the church and the Tiltons then advised the Attorney General he would file a lawsuit in the United States District Court before the deadline of February 10, 1992, to determine their respective rights and privileges. On February 5, 1992 (five days

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[3] Section 17.61(f) of the Texas Deceptive Trade Practices-Consumer Protection Act expressly excepts this information from public disclosure, as does Art. 1302-5.04 of the Texas Miscellaneous Corporation Laws Act, and Articles 6252-17a(3)(a)(1) and (2) of the Open Records Act authorizes nondisclosure by the Attorney General.

before the deadline date set by the Attorney General for the inspection and copying of the documents demanded on January 13, 1992), the Attorney General, pursuant to Art. 1302-5.05, filed a petition *in quo warranto* in the Probate Court of Travis County, Texas.[4] The petition *in quo warranto,* verified by the department head of the Consumer Protection Division of the Attorney General, expressly alleged:

This suit is brought in the nature of *quo warranto* against the

> Defendant corporation . . . *for the purpose of obtaining a permanent injunction ordering Defendant to produce records as requested by the Attorney General, for forfeiture of Defendant's charter* and dissolution of the corporation, an appointment of a receiver to take possession of the affairs of the Defendant, *to rehabilitate,* to reorganize, conserve, or liquidate *the affairs of the corporation,* as the case may be. . . . *A further purpose of this suit is to obtain,* after notice and hearing, a temporary injunction and *a permanent injunction against the Defendant, its officers,* directors, stockholders, agents, employees, *and representatives whomsoever from conducting any business of the Defendant.* . . . (emphasis added).

Further, said petition alleges:

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[4] On February 5, 1992, the Attorney General deliberately did not seek to enforce the remedy under the Texas Deceptive Trade Practices-Consumer Protection Act by filing a lawsuit in a district court in Dallas, Texas, requesting an order that the Plaintiffs comply with the documents demanded on January 13, 1992.

> Article 1302, Chapter 5, Texas Miscellaneous Corporation Laws Act, provides that the Attorney General or his representatives are entitled to examine any books or records of a Texas corporation *as he may deem necessary*. . . . (emphasis added).

The testimony from the Assistant Attorney Generals in charge of this investigation, the records demand of January 13, 1992, and the filing of the *quo warranto* petition establish unequivocably that the Attorney General interprets the two statutes (Texas Deceptive Trade Practices-Consumer Protection Act and Texas Miscellaneous Corporation Laws Act) as giving the Attorney General complete discretion to request any documents from any corporate entity (including a non-profit corporation which operates as a church with its principal or sole purpose of religious activities). Now, after the filing of this lawsuit, the Attorney General admits its demand for documents of January 13, 1992, and its petition *in quo warranto* were inappropriate and should be amended in light of apparent recent knowledge he is dealing with a church.[5]

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[5] It must be stated that the departmental head of the Consumer Protection Department, who personally verified the petition *in quo warranto*, testified he believed that the pleadings in the *quo warranto* petition were simply what a "good lawyer" would plead under the circumstances. In addition, the March 4, 1992, amended document demand states that "[w]hile we [the Consumer Protection Division] do not adopt your legal position in this matter, in an effort to respond to your concerns, we submit to you this modified request for documents. . . . " (emphasis in original).

The testimony of the department head of the Consumer Protection Division of the Office of the Attorney General is that the purpose of the filing of the *quo warranto* petition was to enforce its demand for the records of the church and Mr. Tilton. However, he admitted the timing and location of the filing was to attempt to insure the litigation would be in the Probate Court in Travis County rather than federal court where the Plaintiffs represented they would file this lawsuit.[6]

The Plaintiffs contend that frequent public comment by the Office of the Attorney General regarding the alleged investigation of the church and Mr. Tilton, as well as the conduct described above, constitutes such "bad faith" as to justify refusal to tender any documents of the Plaintiffs and to permanently enjoin the Attorney General from further investigation and public comment. The department head of the Consumer Protection Division of the Office of the Attorney General defends the public statements made by the Attorney General by testifying the staff made "no comment" statements to the media on 80 percent of its inquiries, apparently believing the other occasions of public comment, during an investigation, were appropriate and responsible conduct.

The Court expressly finds from the evidence that the actual statements made by Assistant Attorney Generals and the Attorney General did not technically accuse

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[6] The Court specifically finds the lawsuit filed by Attorney General on February 5, 1992, was a reaction to being advised the Plaintiffs would file in federal court and an attempt by the Attorney General to invoke an abstention doctrine defense based on pending state litigation.

either the church and/or Mr. and Mrs. Tilton of anything, but, on each occasion of public comment, the publicity generated was negative to the church and the Tiltons. The Court finds from the evidence that the conduct of the Attorney General and his personnel in stating the Consumer Protection Division of the Office of the Attorney General had "reason to believe" the church and the Tiltons violated the Texas Deceptive Trade Practices-Consumer Protection Act when they had no substantial evidence for the accusations, the Attorney General's refusing to meet with or confer with the attorney representing the church, selecting the documents demanded from both the church and the Tiltons on January 13, 1992, publishing to the media the accusations and demand of January 13, 1992, continuing to make public comment regarding the Plaintiffs, refusing all proffered cooperation from the Plaintiffs, and filing the verified petition *in quo warranto* on February 5, 1992, was neither professional nor responsible, bordering on the unethical, and constitutes "bad faith." This conduct is not what is expected of attorneys charged with the responsibility of being the legal representatives of the State of Texas.

However, the Court does not find this "bad faith" conduct prevents the Attorney General of Texas from *appropriately* using his authority to investigate the corporate plaintiff to determine if it is truly a non-profit corporation under Texas law.

ABSTENTION

The Attorney General requests dismissal of this case under the abstention doctrine, contending that its *quo*

warranto proceedings in the Probate Court of Travis County, Texas, filed on February 5, 1992, preempts this Court's action. The Attorney General relies on *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and related cases.

As previously stated, the Court specifically finds from the evidence the Attorney General filed the petition *in quo warranto* on February 5, 1992, reacting to the representation by Plaintiffs' counsel a lawsuit would be filed in the United States District Court to determine the rights and privileges of the parties. The Attorney General, through his supervisor of the Consumer Protection Division, admits a purpose of the filing of the *quo warranto* proceedings was to attempt to establish venue and jurisdiction in the Probate Court of Travis County prior to the filing of any federal lawsuit. Thus, the *quo warranto* proceedings were filed with a purpose by the Attorney General to defend the federal lawsuit to be filed by February 10, 1992, on the grounds of abstention. For that reason alone, this Court does not believe that abstention would be appropriate in this case. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977).

The Court finds specifically that it has jurisdiction over the parties and subject matter; that exceptional circumstances certainly exist; and that injunctive relief is necessary for the adequate protection of constitutional rights. *Ealy v. Littlejohn*, 569 F.2d 219 (5th Cir.1978).

However, there are other reasons for not bowing to the abstention request of the Attorney General. Despite

the number of treatises and volumes of cases reviewed, this Court cannot determine any consistent pattern of the Courts in applying the abstention doctrine except that the exceptions are few and must be cautiously granted. It is beyond dispute freedoms of religious worship and of association are foundation pillars of our country. This is true no matter how "flim flam" the religious doctrines and procedures (including solicitation of funds from members and expenditures) of any particular church may appear to others. For generations Americans have died and been persecuted defending these specific constitutional rights.

In this particular case, the Attorney General of the State of Texas has utilized its own interpretation of a statute (Texas Deceptive Trade Practices-Consumer Protection Act) to publicly accuse a church of fraud and demand documents clearly constitutionally protected. The accusation and demand for documents and records are enforced by pleadings *in quo warranto* requesting dissolution of the corporate church, appointment of a receiver to manage its affairs, and an injunction against its ministers from conducting the business of the church which is admitted (by stipulation) to be a bona fide religious organization. These circumstances satisfy, in this Court's judgment, the requirements on exceptions to abstention of irreparable injury being "great and immediate" and the conduct of the Attorney General as "bad faith, harassment or any other unusual circumstance that would require equitable relief."

The Court particularly finds persuasive Judge Debevoise's opinion in *New Jersey – Philadelphia Presbytery v. New Jersey State Bd. of Educ.*, 482 F.Supp. 968 (D.N.J.

1980), *aff'd*, 654 F.2d 868 (3d Cir.1981). There, like here, there were state actions to enforce substantively valid statutes that effectively stopped religious activities, including instruction, education and worship and to enjoin related individuals from the same. *See id.* at 973. Had the Attorney General merely filed a lawsuit in a Dallas state district court for the determination whether an order, pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act (the statute under which the Attorney General alleges his authority to investigate and demand records in this case), should issue requiring the production of the records and documents, this Court, like Judge Debevoise, may have yielded to the state court on abstention grounds. But that is not the case, and the Attorney General's filing the *quo warranto* petition specifying the relief requested by the State under these circumstances compels this Court to act.

Furthermore, in *Smith v. Hightower*, 693 F.2d 359, 366-67 (5th Cir.1982), our Fifth Circuit, in affirming its previous holding in *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir.1979), held there is a three-part test in determining an exception to *Younger*. The case at bar comes within this established rule.

First, the Court finds from the evidence that the Plaintiffs have established that their declining to deliver the records and documents demanded by the Attorney General was an exercise of legitimate and valid First Amendment rights, i.e. constitutionally protected.

Second, the Court finds from the evidence that the Attorney General's filing the *quo warranto* proceedings was motivated by a purpose to retaliate for or to deter the

church and the Tiltons from exercising their constitutional rights in declining to furnish the documents and records demanded, and this "retaliation" was a major motivating factor and played a prominent role in the Attorney General's decision to file the *quo warranto* proceedings.

Third, the Court finds from the evidence that the Attorney General would not have filed a *quo warranto* proceeding under these circumstances "but for" the church and the Tiltons' exercising their constitutional rights. The evidence does not even suggest the Attorney General had independent grounds for any such action.

Therefore, this Court declines to dismiss this case pursuant to the abstention doctrine.

Turning now to the merits, the Plaintiffs specifically seek to enjoin the Attorney General

> from conducting any *civil* investigation or investigation of any kind of the Plaintiffs' religion pursuant to the DTPA and the MCLA, and further to enjoin the Attorney General from forfeiting, or attempting to do so in any Court action, this Plaintiff Church's charter and its right to conduct its religious service in the State of Texas pursuant to the MCLA and further to prohibit the Attorney General from levying any fine against the Church pursuant to the MCLA and further to prohibit and enjoin the Attorney General from imprisoning Robert G. Tilton, the principal minister of this religion and/or his wife Martha Phillips Tilton, or any other member or employee of this Plaintiff Church pursuant to the MCLA, and further to prohibit the Attorney

> General from interfering, meddling or entangling with or in the religious and or financial affairs of Word of Faith World Outreach Center Church, Inc. or abridging the Plaintiffs' constitutional right of freedom of religion in any manner. . . .

Plaintiffs' First Amended Original Complaint and Application for Injunctive Relief, para. 19 (emphasis in original).

The Attorney General has requested the Plaintiffs to produce a lengthy list of documents, records, and other materials he believes relevant to his investigation of the Plaintiffs under the Deceptive Trade Practices-Consumer Protection Act (DTPA) and under the common law of charitable trusts.

Thus, this Court must determine (1) whether the DTPA applies to the Plaintiffs on its face; (2) whether the DTPA, as interpreted by the Attorney General, can be constitutionally applied to the church or its representatives; (3) whether the Texas Miscellaneous Corporation Laws Act ("MCLA") applies to the Plaintiffs on its face; (4) whether the MCLA, as interpreted by the Attorney General, may be constitutionally applied to the Plaintiffs; (5) whether the church is a charitable trust subject to Texas common law concerning charitable trusts; (6) whether the Attorney General may constitutionally investigate and inspect records of the church under Article 4, Section 22 of the Texas Constitution, which authorizes the Attorney General to inquire into the charter rights of private corporations and take action to prevent a corporation from exceeding its powers authorized by law; and (7) whether the Attorney General has the power and authority to investigate the church and inspect records under

any other law, for instance the Texas Non-Profit Corporation Act, and, if so, to what extent may that power be exercised under state law and the United States Constitution.

TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT

In his January 13, 1992, demand the Attorney General published he "had reason to believe that Word of Faith Family Church & World Outreach Center . . . has engaged in trade practices and charitable solicitations which may violate provisions of state law including the Texas Consumer Protection and Deceptive Trade Practices Act ("DTPA")."[7] Accordingly, the Attorney General required

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[7] Specifically, the Attorney General stated he had reason to believe that the Church's activities violated section 17.46(a) of the DTPA and the following provisions of section 17.46(b) of the DTPA:

> (b)(2) Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of *goods* or *services;*
> (b)(5) Representing that *goods* or *services* have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
> (b)(12) Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
> (b)(19) Representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve; and
> (b)(23) Failing to disclose information concerning goods or services which was known at the time of the

the production of documentary material for inspection and copying pursuant to the DTPA and the MCLA.

In his brief and in hearings before this Court, the Attorney General continues to maintain the Plaintiffs are subject to the DTPA because it is alleged they solicit and accept donations from members and others, distribute various pamphlets, books, and objects, and make certain representations that are not technically accurate. Plaintiffs, in opposition, argue that the DTPA does not apply as they are not engaged in "trade or commerce" and the contributors to the church ("members") are not "consumers" because no money is required to receive anything from the church or to have Mr. Tilton pray over returned objects or perform other acts and because contributors' donations are not requested for any specific purpose.

This Court agrees the Texas Deceptive Trade Practices-Consumer Protection Act has no applicability in this case. Although no Texas court has considered the applicability of the DTPA to church activities and donations,

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transaction if such failure to disclose such information was intended to induce the *consumer* into a transaction into which the *consumer* would not have entered had the information been disclosed.

January 13, 1992, letter from the Attorney General to the Tiltons (emphasis added). Note that the Attorney General would be unable to prove violations against the Church under any of the provisions using the words "goods", "services", and "consumer", regardless of the DTPA's applicability otherwise. As defined in Section 17.45, each of those words requires that a person seek to purchase or lease a good or service. *See* Tex.Bus. & Com.Code Ann. § 17.45(1), (2), (4).

the language of the DTPA as well as Texas case law make clear the Plaintiffs are not subject to the DTPA.

The Attorney General's Office asserts its authority to investigate and inspect documents under the auspices of Sections 17.60 and 17.61 of the DTPA, which give the Attorney General power to investigate and inspect relevant documentary material when the Attorney General has "reason to believe that a person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter [the DTPA]. . . . " *See* Tex. Bus. & Com.Code Ann. §§ 17.60, 17.61 (Vernon's 1992 Supp.). Section 17.46(a) makes unlawful "[f]alse, misleading, or deceptive acts or practices in the conduct of any *trade or commerce*" and gives a list of some acts which fall within the definition of proscribed conduct. *Id.* § 17.46(a) (emphasis added).

"Trade" and "commerce" are defined in Section 17.45(6) as "the advertising, offering for sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, ..." In its brief the Attorney General focuses on "the advertising . . . or distribution of any good or service" and claims that under this definition and the case of *Mother & Unborn Baby Care of N. Texas, Inc. v. State,* 749 S.W.2d 533 (Tex.App. – Ft. Worth 1988, writ denied), *cert. denied* 490 U.S. 1090, 109 S.Ct. 2431, 104 L.Ed.2d 988 (1989), all that is needed to fall within "trade" or "commerce", and to be subject to the DTPA, is advertising or distribution of a good or service whether or not it is advertised as though it were for sale, and whether or not

the recipient of the good or service believed it to be for sale or sought to purchase it.

Not only is this a misinterpretation of *Mother & Unborn Baby Care of North Texas, Inc. v. State*, in which the Court found that misleading advertising led women to believe doctors would perform abortions for a fee, *see id.* at 537, but the reading of the DTPA as a whole makes it clear that the Texas legislature was concerned with "business", not gratuitous, transactions. Furthermore, there must be some "consumer", either the plaintiff or, if the Attorney General is bringing the action, "consumers" within the statutory definition whose rights will be protected. *See generally*, Tex.Bus. & Com.Code §§ 17.41, *et seq.*; *see also Pennington v. Singleton*, 606 S.W.2d 682 (Tex.1980); *Mother*, 749 S.W.2d 513.

As stated by the Texas Supreme Court, "[l]egislative intent should be determined from the language of the entire Act and not isolated portions." *Pennington*, 606 S.W.2d at 686. "[L]egislative intent rather than the strict letter of the Act will control." *Id.* The Legislature's intent was clearly stated in Section 17.44. "This subchapter shall be liberally construed and applied to promote its underlying purposes, which are *to protect consumers* against false, misleading, and deceptive *business* practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." Tex.Bus. & Com.Code Ann. § 17.44 (emphasis added). It is not just to be liberally construed, rather it is to be liberally construed to promote its express purposes. *See id.*; *see also Pennington*, 606 S.W.2d at 686, 688, 690.

Section 17.44 makes it clear that the "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce" described in Section 17.46 must be "business" acts or practices. Solicitation of funds from church members, and new members,[8] is not a business practice. *See Murdock v. Pennsylvania*, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943). The Attorney General cannot seize upon a technical ambiguity in one section of the Act to try to insure that Texas residents donate their money only in ways he deems wise. The DTPA was meant to protect those residents from deceptive "business" acts and practices only.

Nor can the church's or Mr. Tilton's actions be described as "unconscionable", protection against which is also a purpose under Section 17.44. Donating money to a religious cause one believes in can hardly be to one's detriment as a result of being taken advantage of to a "grossly unfair degree". *See* Tex.Bus & Com.Code Ann. § 17.45(5). That is clearly a value judgment the Attorney General is incapable of making in this case.

Finally, there are no grounds for a breach of warranty action, the only remaining purpose of the DTPA enumerated in Section 17.44. Because the DTPA does not define or create any warranties, the Attorney General must establish the existence of a warranty based on statutory or common law. *See La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex.1984). Express or implied warranties arise out of contracts or sales. Again,

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[8] Plaintiffs testified that a contributor is automatically considered to be a "member" of the church, and the Attorney General did not dispute this construction.

the facts of this case show that no sales or contracts existed. Donations were distinct and separate from prayer requests and receipt of other materials or acts from Mr. Tilton or the church and cannot form the bases of sales or the consideration for contracts.

In addition to there being no "trade" or "commerce" to satisfy Section 17.46 and no action protected against under Section 17.44, there are no "consumers". The fact that Section 17.47, which gives the Consumer Protection Division the power to bring an action for injunctive relief, does not explicitly require the Attorney General to act on behalf of some consumer is irrelevant. The purpose of the DTPA is to protect "consumers" and no other class of persons. *See* Tex.Bus. & Com.Code Ann. § 17.44. That purpose is paramount to technical readings of individual sections. *See id.; see also Pennington,* 606 S.W.2d at 686.

Furthermore, the very name of the Act, the Deceptive Trade Practices-Consumer Protection Act, and the name of the agency in charge of enforcing the Act, the Consumer Protection Division, also indicate that the Attorney General can only act under the DTPA to protect consumers.

A "consumer" under the DTPA is a person "who seeks or acquires by purchase or lease, any goods or services. . . . " Tex.Bus. & Com.Code Ann § 17.45(2). In order to be a consumer, one must purchase or seek to purchase goods or services. *Rutherford v. Whataburger, Inc.,* 601 S.W.2d 441, 444 (Tex.App. – Dallas 1980, writ ref. n.r.e.) (plaintiff who had won a contest prize but not received it was not a "consumer" because he did not seek or purchase to seek the prize and because no purchase

was required to enter the contest); *Mother*, 749 S.W.2d at 538 (women seeking abortions were "consumers" because they sought to purchase a service).

Contributors to the church do not seek to purchase goods or services. Plaintiffs do not advertise goods or services for sale. Contributors to the church are not required to give donations in order to receive pamphlets, books, or other goods. Nor is a donation required before Mr. Tilton will pray over a prayer request or perform other acts. There is nothing to make contributors to the church believe their contributions are in return for requested materials or acts by the church or Mr. Tilton. In fact, not only do members sometimes make "vows" or contributions without requesting any materials or acts to be performed by Mr. Tilton, but the church makes it a practice to inform persons who seek to "purchase" items that the church no longer sells anything and offers to refund their money. Contributors to the church are not "consumers", and the Attorney General may not bring a DTPA action to protect their interests.

Even if the DTPA were applicable to the Plaintiffs on its face, it still could not be constitutionally applied to the Plaintiffs as interpreted by the Attorney General. The fact that the DTPA has a valid purpose and was not enacted to discriminate against a religion or restrict the free exercise of a religion, does not mean any effects on the Plaintiffs are merely incidental and permissible under the First Amendment. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S.Ct. 1526, 1535-36, 32 L.Ed.2d 15 (1972); *Bates v. City of Little Rock*, 361 U.S. 516, 523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171-72, 2 L.Ed.2d 1488 (1957); *Murdock*, 319

U.S. at 115, 63 S.Ct. at 876. The investigation sought by the Attorney General under the provisions of the DTPA in this case unduly burden the Plaintiffs' First Amendment rights to exercise their religion free from excessive governmental interference or entanglement.

Sections 17.60 and 17.61 of the DTPA give the Attorney General unfettered discretion to inquire into the inner workings of the church and inspect and copy its documents and records. Section 17.60 allows the Consumer Protection Division of the Office of the Attorney General to require the church to file a statement or report as to *"all* the facts and circumstances concerning the alleged violation and such other data and information *as the consumer protection division deems necessary"* whenever it "has *reason to believe* that a person is engaging in, has engaged in, or is about to engage in any act or practice declared unlawful by this subchapter, or when it *reasonably believes* it to be *in the public interest*. . . . " Tex.Bus. & Com.Code Ann. § 17.60 (emphasis added). Section 17.61 gives the Consumer Protection Division authority to demand a person to produce documentary material and permit inspection and copying "[w]henever the consumer protection division *believes* that any person may be in possession . . . of *any* documentary material relevant to the subject matter of an investigation of a possible violation of this subchapter. . . . " *Id.* § 17.61(a) (emphasis added).

The Attorney General clearly interprets these sections as broadly as they appear, applying them to the Plaintiffs without consideration for any First Amendment Rights as a religious organization. In the January 13, 1991,

document demand sent to the Tiltons, the Attorney General demanded, amongst other things:

(1) Media plans and insertion data for television presentations and written solicitations made by the Church;

(2) All documents, shipping records, memoranda and other materials relating to the handling of prayer requests and any other solicitation material which is claimed to be the subject of any prayer or other entreaty to God by Robert Tilton or any other person employed by the Church from January 1, 1989, to and including the present;

(3) All cancelled checks and other documentary material relating to contributions sent to each orphanage, mission, ministry, and charitable organization by Robert Tilton or the Church during the period from January 1, 1989 to and including the present;

(4) Testimonials or complaints from any individuals who have sent money or anything else of value to Robert Tilton, Marte Tilton, the Church, or any other Church entity from January 1, 1989, to and including the present;

(5) List of all Church employees and consultants that have received in excess of $100,000 from the Church or any Church entity from January 1, 1987, to and including the present, including the name, address, and telephone number of each person and amounts received;

(6) List of all persons who have been paid or remunerated in any way in excess of $100,000 from the Church

or any Church entity from January 1, 1987, to and including the present, including the name, address, and telephone number of each person;

(7) List of all persons who have sent contributions to the Church and any other Church entity from January 1, 1989, to and including the present, including name, address, telephone number, amount and date of contribution;

(8) List of all vendors and/or contract labor that have received payments in excess of $50,000 from the Church and any other Church entity from January 1, 1987, to and including the present, including name, address, telephone number, and amounts and dates received;

(9) Copies of the minutes of meetings of the board of directors for the Church held since January 1, 1987, to and including the present;

(10) List of all members of Robert Tilton's family who are involved in any way with the production of Robert Tilton's television broadcasts;

(11) A copy of all policy or procedure manuals relating to the method and manner in which the Church, other Church entities, and Robert Tilton solicit contributions;

(12) A copy of every advertisement, brochure, or other document used in the promotion or marketing of the Church and all other Church entities.[9]

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[9] To avoid undue repetition, the Court has combined some of the Attorney General's specific requests in this list.

The scope and substance of these requests are clearly unconstitutional.[10] The State has no constitutional authority to know a person's membership in or support of any church. The State has no constitutional authority to know what a person believes, how he or she practices religion, or how he or she supports religious activities. Nor does the State have constitutional authority to probe into the internal operations of a church without limitation or compelling purpose. The First Amendment right to freedom of religious belief and freedom of association protects this kind of information.

Implicit in these First Amendment freedoms is privacy of belief and association. *See Buckley v. Valeo,* 424 U.S. 1, 65-67, 96 S.Ct. 612, 657, 46 L.Ed.2d 659 (1976); *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 544, 83 S.Ct. 889, 892-93, 9 L.Ed.2d 929 (1962); *Bates v. City of Little Rock,* 361 U.S. at 523, 80 S.Ct. at 416; *N.A.A.C.P. v. Alabama,* 357 U.S. at 462, 78 S.Ct. at 1171-72. Disclosure of who belongs to a group or who contributes to a group, and how much, has been vigorously safeguarded by the United States Supreme Court. *See id.* The Court has recognized that disclosure to the public, or to the State, of a groups' members or contributors can harm the group by subjecting them to harassment or causing

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[10] The scope of the request is also unreasonable and clearly oppressive insofar as it requires the Plaintiffs to produce an enormous amount of documents, which do not appear to have relevance to the alleged purpose of the investigation. For example, the Church grosses approximately $65,000,000 a year. The number of checks received and mailed out and the documents produced, even over a three-year period, would be unimaginable, much less easily produced.

new members to not join for fear of disclosure or harassment or other reprisal. *E.g., Gibson,* 372 U.S. 539, 83 S.Ct. 889 (Florida legislative committee could not require Gibson to produce N.A.A.C.P.'s organization list for the committee).

The Attorney General argues that the church's First Amendment rights of free exercise of their religion and association are not harmed because the DTPA requires that the Attorney General not publicly disclose information gathered under Section 17.61 *See* Tex.Bus. & Com.Code Ann. § 17.61(f). This argument is seriously flawed. Nothing prevents the Attorney General from disclosing information gathered under Section 17.60, and given past interpretations of statutes by the Attorney General,[11] it is not unforeseeable that the Attorney General might seize upon this distinction.

In addition, the mere threat of disclosure has been recognized as seriously harming a group by causing new members to not join and old members to withdraw in fear of hostility or reprisal. *Bates,* 361 U.S. at 524, 80 S.Ct. at 417; *Familias Unidas v. Briscoe,* 619 F.2d 391, 398, 400 (5th Cir. 1980). Thus, if the Attorney General is permitted to make such a request and discloses the request, as done in this case, that in itself is a significant intrusion on the

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[11] Recall that the Attorney General interprets the Open Records Act exemption of information "demed confidential by law" to mean that it is nonetheless permissible to release to the media document requests for information made confidential by the DTPA and the MCLA, describing in detail what the Attorney General is seeking. *See* Tex.Rev.Civ.Stat.Ann. Art. 6252-17a(3)(a)(1) (Vernon's 1992 Supp.); Tex.Bus. & Com.Code Ann. § 17.61(f); Tex.Rev.Civ.Stat.Ann. Art. 1302-5.04.

Plaintiffs' First Amendment rights. Such harm was shown in this case by the Plaintiffs, who testified that the number of new members joining the church has decreased and the number of old members withdrawing has increased. Death threats and other forms of harassment have also increased. This harms not only the Plaintiffs' rights of association but also the exercise of their religion, which to a large degree involves attracting new members to their faith and encouraging people to make "vows" to God.

Furthermore, Section 17.61(f) states that information gathered under that section may be used "in the enforcement of this subchapter, including presentation before any court." Given the publicity surrounding the hearings in this case so far, the Attorney General would be hard pressed to argue that information gathered will not be made public in the future.

Absent a compelling State interest, the Attorney General's "signficant encroachment" upon "important and traditional aspects of individual freedom" cannot be tolerated. *See Bates* 361 U.S. at 524, 80 S.Ct. at 417; *N.A.A.C.P. v. Alabama*, 357 U.S. at 463, 78 S.Ct. at 1172; *Familias*, 619 F.2d at 399. The Attorney General's proffered reason for investigation is to determine if the Plaintiffs are persuading people to contribute to the Church through misrepresentations or fraud. Membership lists and contributors lists will not further that interest. Full and complete documentation of the Church's internal affairs may further that purpose, but such discretion is overbroad and if not more narrowly drawn cannot survive constitutional

attack.[12] *Cf. Int'l Soc'y for Krishna Consciousness v. City of Houston*, 689 F.2d 541, 556 (5th Cir.1982) (Houston ordinance, simply requiring registration for groups to solicit, did not require membership lists or lists of contributors or inquire about the organization's internal operations, apart from its public solicitation, and thus was constitutional).

Allowing the Plaintiffs to petition to modify or set aside the demand does not rectify the infringement on Plaintiffs' First Amendment rights. *See* Tex. Bus. & C. § 17.61(g); *see also Murdock*, 319 U.S. 105, 63 S.Ct. 870. Plaintiffs should not be forced to resort to the courts to be allowed to exercise their First Amendment rights. Section 17.61(g) of the DTPA requires just that in order for a person to challenge the Attorney General's document demand. Having to resort to the courts before exercising a First Amendment right is even more of an infringement than requiring fees to be paid first. *See id.* Section 17.61(g) is not, contrary to the Attorney General's opinion, "adequate due process".

Furthermore, proceeding with the investigation under the DTPA, as interpreted by the Attorney General,

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[12] The Attorney General, during the hearings, tacitly admits both the January 13, 1992, document demand and requested relief in the *quo warranto* proceedings are unconstitutionally invasive and requested that amendments to both documents be allowed. The testimony of the Assistant Attorney Generals, in the hearings and in the proposed amended document request, however, remains consistent – they appropriately acted under their statutory authority in the DTPA. This "King's X" approach merely emphasizes the unconstitutional application of the statute to a church, its ministers, and its members.

would result in an excessive entanglement with the Church in violation of the Establishment Clause of the First Amendment.

During the hearing on injunctive relief before this Court, Assistant Attorney Generals testified that they were not trying to prevent the Plaintiffs from practicing their religion as they see fit or discourage membership in the church, but rather only wanted to investigate as to whether or not "secular statements" made in pamphlets and on television by Mr. Tilton were false or deceptive. For instance, if Mr. Tilton promised to pray over a prayer cloth, did he actually do so? However, the Assistant Attorney Generals fail to take the next logical step. If they apply the DTPA, and if they determine the church or Mr. Tilton have violated the DTPA, the relief granted under the DTPA is injunctive. *See* Tex.Bus. & Com.Code Ann. § 17.47(a).

In order to withstand attack under the Establishment Clause, three requirements must be met:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971) (citations omitted); *see also United States v. Holmes*, 614 F.2d 985, 989 (5th Cir.1980).

While the Attorney General can easily show that the DTPA meets the first two requirements, the nature of the injunctive relief authorized by the DTPA in section 17.47

is such that the "end result" is "an excessive government entanglement with religion." *See Walz v. Tax Com'n of New York*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970); *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 76 (1st Cir.1979). In *Surinach*, the First Circuit Court of Appeals found an investigation of operating costs of Catholic schools under a statute quite similar to the DTPA unconstitutional. *See Surinach*, 604 F.2d at 75. The statute was enacted to "defend and implement the rights of the consumer, to restrain inflationary trends; as well as the establishment and inspection of a price control over the goods and services for use and consumption." *Id.* at 74. The Secretary of the Department had "untrammelled" investigatory powers under which he could "require the information which might be necessary, pertinent and essential to achieve such purposes." *Id.*

Because the gathering of information was "not viewed as an end in itself", but merely as the first step in ultimately imposing ceilings on what the schools could spend, the Court found that if the end result was unconstitutional so was the investigation. *Id.* at 75. Examining the end result, the Court determined that cost limits the Department might impose could seriously interfere with religious objectives and duties the school felt it owed its students. *Id.* at 77. In addition, imposition of cost controls would necessitate continuing surveillance by the Department which would also result in an impermissible degree of entanglement. *Id.* at 78 (citing *Walz*, 397 U.S. at 675, 90 S.Ct. at 1414).

Investigation of the Plaintiffs under the DTPA is equally impermissible under the First Amendment. Investigation of the Plaintiffs by the Attorney General

under the DTPA is for the sole purpose of ascertaining whether or not the Plaintiffs have violated the DTPA. If the Attorney General determines that a violation exists, he may seek injunctive relief. *See* Tex.Bus. & Com.Code Ann. § 17.47(a). If injunctive relief is granted, the court retains jurisdiction, and the Attorney General may bring actions if the Plaintiffs do not comply, meaning of course that the Attorney General must monitor the Plaintiffs' activities to ensure compliance. *See id.* § 17.47(e). Plaintiffs' pamphlets, advertisements, television broadcasts, sermons, etc., would be subject to inspection and approval by the Attorney General. Certainly this continual monitoring of the Plaintiffs' activities by the Attorney General would constitute an excessive entanglement. *See Walz*, 397 U.S. at 675, 90 S.Ct. at 1414.

This would also require the Attorney General to make determinations as to which representations are purely religious and which are secular. The Assistant Attorney Generals assure this Court they can distinguish purely religious assertions from secular assertions subject to the DTPA. Despite the Assistant Attorney Generals' confidence, this Court does not believe they or any other state officials are authorized to make those kind of determinations. *See e.g., Cantwell v. Connecticut*, 310 U.S. 296, 305-06, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940) (state could not give a state official the power to determine if a solicitation was for a religious cause or not in order for the solicitor to receive a license to solicit); *Lemon*, 403 U.S. at 618-19, 91 S.Ct. at 2114 ("With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine"). It is simply not the business of courts or the State to

"approve, classify, regulate, or in any manner control sermons delivered at religious meetings" or other forms of religious expressions. *See Fowler v. Rhode Island,* 345 U.S. 67, 70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953).

The fact that the investigation may not reveal violations or that the Attorney General may not seek injunctive relief does not make the investigation constitutional. As stated in *Surinach,* "bifurcation of the gathering of the information and the purpose for which it is sought . . . [is] both artificial and constitutionally unsound." *Id.* at 75. If there is no constitutional end use of the information gathered, there is no reason for this Court to wait until a constitutional violation has actually occurred. *See id.* at 75-76; *cf. Ambassador College v. Geotzke,* 675 F.2d 662, 664 (5th Cir.), *cert. denied* 459 U.S. 862, 103 S.Ct. 138, 74 L.Ed.2d 118 (1982). (Because an individual sought discovery, there was no danger of the "*government* seeking to monitor or regulate" a religious group, and therefore *Surinach* did not apply).

In sum, the express wording of the Texas Deceptive Trade Practices-Consumer Protection Act makes the Act inapplicable to the factual circumstances of this case and, even if applicable, the DTPA, as interpreted by the Attorney General and as used in this case, cannot be constitutionally applied to the Plaintiffs.

TEXAS MISCELLANEOUS CORPORATION LAWS ACT

As previously mentioned, the Attorney General did not file a petition for enforcement in a Dallas district court under Section 17.62(b) of the DTPA, but rather

asserts his authority to investigate under the Texas Miscellaneous Corporation Laws Act ("MCLA").[14] The MCLA, as interpreted by the Attorney General, also cannot be constitutionally applied to the Plaintiffs in this case.

The Church is incorporated as a non-profit corporation under the Texas Non-Profit Corporation Act. As such, Article 1302-1.03 of the MCLA causes the church to be governed by the MCLA "[e]xcept to the extent that any provisions of [the MCLA] are expressly made inapplicable by . . . the Texas Non-Profit Corporation Act. . . ."[15] *See* Tex.Rev.Civ.Stat. Art. 1302-1.03(B) (Vernon's 1992 Supp.).

Nonetheless, as interpreted by the Attorney General, the provisions of the MCLA may not be constitutionally applied to the Plaintiffs. Not only is the discretion of the Attorney General to investigate under the MCLA as broad and unbridled as it is under the DTPA, but the remedies provided under the MCLA and sought by the

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[14] The Office of the Attorney General was quite creative in their combining of statutes in the *quo warranto* proceeding. They seek to investigate possible violations of the DTPA. They assert their investigative power under the MCLA. And, they filed in Probate Court in Travis County pursuant to the Texas Probate Code.

[15] Note that one of the remedies sought by the Attorney General in the original *quo warranto* proceeding, receivership under the MCLA, is expressly made inapplicable by Article 1396-7.07, which states that "[n]o receiver shall be appointed for any corporation in which this Act applies or for any of its assets or for its business *except* as provided for and on the conditions set forth *in this act.*" *See* Tex.Rev.Civ.Stat.Ann. Art. 1396-7.07(A) (emphasis added).

Attorney General would wholly deprive the Plaintiffs of their right to worship. *See generally* Tex.Rev.Civ.Stat.Ann. Art. 1302-5.01 *et seq.*

> Under Article 1302-5.01
>
> [e]very corporation . . . doing business in Texas, shall permit the Attorney General . . . to make examination of *all* the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws, and other records of said corporation *as he may deem necessary.*

Id. at Art. 1302-5.01(A) (emphasis added). Under Article 1302-5.03

> [t]he Attorney General . . . has the power and authority to make investigation into the *organization, conduct and management* of any corporation . . . authorized to do business within this State, and has authority to inspect and examine *any* of its said books, records, and other documents, and take such copies thereof as *in his judgment* may show *or tend to show* said corporation has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this State.

Id. at Art. 1302-5.03(A) (Vernon's 1992 Supp.) (emphasis added).

This is not just unbridled discretion, this is complete discretion. As these articles read, and as the Attorney General interprets them,[16] the Attorney General may

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[16] Recall once again that even in the amended Document Request, the Consumer Protection Division maintains that it

inquire about, and inspect or investigate, literally any aspect of the Church. For the same First Amendment freedom of religion and association concerns described above with respect to the DTPA, this Court finds application of these articles to the Plaintiffs unconstitutional.[17]

The penalty section, under which the Attorney General sought various remedies in the Information *in quo warranto* filed on February 5, 1992, is even more egregious. Article 1302-5.05 states that

> A. Any . . . domestic corporation which shall fail or refuse to permit the Attorney General . . . to examine or take copies of *any* of its said books, records, and other documents . . . *shall* thereby *forfeit its right to do business* in this State; and its permit or charter shall be canceled or forfeited.
>
> B. If any . . . officer of any domestic . . . corporation doing business under permit or charter from this State shall refuse to permit the Attorney General . . . to make such examination . . . or to take copies of *any* or all of the books, accounts, records, minutes, letters, memoranda,

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does not adopt the Plaintiffs' legal position in the matter, but rather modified the request merely "in an effort to respond" to the Plaintiffs' (and presumably this Court's) concerns.

[17] And, for the same reasons described above with respect to the DTPA's nondisclosure provision, this Court finds Article 1302-5.04, which prohibits public disclosure of information gathered under the MCLA except "in a suit by the State . . . or for information of any officer of this State charged with the enforcement of its laws", equally unprotective of the Plaintiffs' First Amendment rights.

> documents, checks, vouchers, telegrams, constitution and by-laws and other records of said corporation, he *shall* be *fined* not less than one hundred nor more than one thousand dollars, and be *imprisoned* in jail not less than thirty nor more than one hundred days. Each day of such failure or refusal shall be a separate offense.

Tex.Rev.Civ.Stat.Ann. Art. 1302-5.05 (Vernon's 1992 Supp.).

Proceeding under Article 1302-5.05 and Article 1302-5.10, the Attorney General sought "forfeiture of [the church's] charter and dissolution of the corporation and appointment of a Receiver to take possession of the affairs of the [church], to rehabilitate, reorganize, conserve or liquidate the affairs of the corporation" and sought a "Permanent Injunction against the [church], its officers, directors, stockholders, agents, employees, and representatives whomsoever from conducting any business of the [church]. . . . " *See id.* Art. 1302-5.05, Art. 1302-5.10 (Vernon's 1992 Supp.). Application of these remedies to the Plaintiffs is clearly unconstitutional. It is absurd for the Attorney General to think that it can deprive the Plaintiffs of their rights to freely worship as a group altogether as punishment for the Plaintiffs' initial assertion of their First Amendment rights to not produce constitutionally protected documents. *See generally Murdock,* 319 U.S. 105, 63 S.Ct. 870, *Cantwell,* 310 U.S. 296, 60 S.Ct. 900.

Furthermore, although the Attorney General did not explicitly request fine or imprisonment under Article 1302-5.05, that article says refusal to produce requested documents "shall" result in forfeiture of the corporations

right to do business and its charter and "shall" result in a fine and imprisonment of the officer refusing to comply with the Attorney General's demand. *See* Tex.Rev.Civ. Stat.Ann. Art. 1302-5.05. Thus, it is not inconceivable that the Probate Court might also impose fines or imprison Mr. or Mrs. Tilton. If so, a fine for exercising one's First Amendment rights would clearly be unconstitutional under *Murdock v. Pennsylvania*, which did not even permit a fee to exercise First Amendment rights to spread one's religious beliefs. *See Murdock*, 319 U.S. at 115, 63 S.Ct. at 876. Imprisonment would also clearly be unconstitutional, both as a punishment for exercising one's constitutional rights and because it would wholly prevent Mr. or Mrs. Tilton from exercising an important part of their religious beliefs, which is to spread their religious faith to others. *See id.*

Finally, the MCLA does not even have a provision, as does the DTPA, allowing the Plaintiffs to bring an action to challenge the document demand. Having determined that forcing the Plaintiffs to seek a court order to permit them to exercise their constitutional rights is violative of those rights, giving them no means of redress is even more damaging.

The investigation and penalty provisions of the MCLA, as interpreted by the Attorney General, may not be constitutionally applied to the Church or to the Tiltons.

CHARITABLE TRUSTS LAW

The Attorney General also maintains that the Church is a charitable trust and that, as such, it is the Attorney

General's common law duty to protect the public's interest with respect to that charitable trust.[18] Without having to reach the Attorney General's duties over charitable trusts under the common law, this Court finds that the church is not a charitable trust.

A "charitable trust" as defined in the Texas Property Code includes a "charitable entity." Tex.Prop.Code Ann. § 123.001(2) (Vernon's 1992 Supp.). A "charitable entity", in turn, is defined as a "corporation, . . . or other entity organized for scientific, educational, philanthropic, or environmental purposes, social welfare, the arts and humanities, or another *civic or public purpose* described by Section 501(c)(3) of the Internal Revenue Code of 1986. . . . " *Id.* at § 123.001(1). The Attorney General argues that because Section 501(c)(3) of the Internal Revenue Code includes a corporation operated for religious purposes the Church is a charitable entity.

This Court disagrees. A church is not organized for a "civic or public purpose". If the Legislature had intended to incorporate any entity described in the Internal Revenue Code, whatever its purpose, it could have easily done so. The church is not a charitable trust, and because jurisdiction in the Travis County Probate Court is based on the church being a charitable trust, that jurisdiction is improper. *See* Tex.Probate Code Ann. § 5A (Vernon's 1992 Supp.).

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[18] Only if the church is a charitable trust is filing in the Travis County Probate Court proper. *See* Tex.Probate Code Ann. § 5A(c), (d), (e) (Vernon's 1992 Supp.).

TEXAS NON-PROFIT CORPORATION ACT

This Court's finding that the DTPA and MCLA cannot be constitutionally applied to the Plaintiffs and that the *quo warranto* proceeding may not be properly maintained in the Travis County Probate Court does not mean that the Attorney General has no authority to investigate the Plaintiffs.

The Court agrees with the Attorney General that persons may not, "under the cloak of religion" use the First Amendment "with impunity" to "commit frauds upon the public". *See Cantwell,* 310 U.S. at 306, 60 S.Ct. at 904. Nonetheless, the Attorney General cannot, in turn, use allegations of fraud as a sword to violate the Plaintiffs' First Amendment rights either. Lines must be drawn and interests balanced. The DTPA and the MCLA, as interpreted by the Attorney General, are too broad and give too little protection and may not be constitutionally applied to the Plaintiffs. The Texas Non-Profit Corporation Act ("NPCA"), however, may be constitutionally applied.

Article 1396-2.01 of the NPCA states that a corporation organized under the NPCA "shall" fully state its purposes in its articles of incorporation. Tex.Rev.Civ. Stat.Ann. Art. 1396-2.01 (Vernon's Supp.1992). It also lists some permissible purposes, including charitable and religious. *See id.* The church is properly organized as a non-profit corporation, and its articles of incorporation (Restated) properly list its purposes. The Attorney General has the right to test that – to determine if the church

is indeed operating only within the scope of its stated purposes.

The Attorney General's authority stems from both the Texas Constitution and the Non-Profit Corporation Act. Article 4, section 22 of the Texas Constitution states that the Attorney General

> shall especially *inquire into the charter rights* of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power . . . not authorized by law. (emphasis added).

Article 1396-7.01 gives the Attorney General the authority to seek dissolution of a non-profit corporation "when it is established . . . [t]he corporation has continued to transact business beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation." Tex.Rev.Civ.Stat.Ann. Art. 1396-7.01(A)(3).

The Texas Constitution and the Non-Profit Corporation Act make it clear that the Attorney General does have the limited power under a "properly narrowed summons" to investigate in order to determine if the church is operating within the limited purposes for which it was incorporated and if it may retain its non-profit status. *See United States v. Grayson County State Bank*, 656 F.2d 1070, 1074 (5th Cir.1981); *United States v. Holmes*, 614 F.2d 985, 989 (5th Cir.1980) ("Requiring plaintiff to comply with a properly narrowed summons in order to show its entitlement to tax exempt status results in only an incidental burden upon his free exercise of religion").

Furthermore, to the extent financial records actually kept by the church are necessary to make that determination, they may be inspected. That Article 1396-2.23A specifically exempts a religious institution from having to maintain, and make available to the public, financial records "with respect to all financial transactions of the corporation" does not mean records actually kept are necessarily exempt from inspection as well. Article 1396-2.23 requires all non-profit corporations to keep "correct and complete books and *records of account*" for inspection by any member. Tex.Rev.Civ.Stat.Ann. Art 1396-2.23 (emphasis added). Thus, the church is not exempt from all record-keeping, but rather only in depth financial record-keeping. It would be ludicrous to find that the Attorney General has no authority to look at any financial records given his duties and powers under the Texas Constitution and the NPCA to insure that non-profit corporations are non-profit.

CONCLUSION

The Court holds that the Texas Deceptive Trade Practices-Consumer Protection Act and the Texas Miscellaneous Corporation Laws Act, as interpreted by the Attorney General, may not be constitutionally applied to the Word of Faith World Outreach Center, Incorporated, to Robert G. Tilton, or to Martha Tilton. The *quo warranto* proceeding in the Travis County Probate Court, Cause No. 59,268, is permanently enjoined. The Attorney General of Texas, is permanently enjoined from pursuing further its January 13, 1992, demand for documents and investigation pursuant to the DTPA and the MCLA, but this order is without prejudice to the Attorney General to

appropriately pursue an investigation of the Plaintiffs under the Texas Non-Profit Corporation Act.

APPENDIX E

Texas Rule of Appellate Procedure 114 Certification of Questions of Law by United States Courts

(a) Certification of Questions of Law. The Supreme Court of Texas may answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States when requested by the certifying court, if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

(b) Contents of the Certification Order. A certification order shall set forth:

(1) The questions of law to be answered.

(2) A stipulated statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(3) The names of each party to the pending cause.

(4) The names and addresses of counsel for each party.

(c) Preparation of Certification Order. The certification order shall be prepared by the certifying court and forwarded to the Supreme Court of Texas by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all

or any portion of the record before the certifying court to be filed under the certification order, if in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(d) Fees and Costs. Fees and costs shall be the same as in direct appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(e) Briefs and Oral Argument. Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The appealing party in the certifying court shall file his brief with the clerk of the Supreme Court within thirty days from the date of receipt of the notice and the opposing parties shall file an answering brief within fifteen days of service of copies of the opening brief. Briefs shall be in the manner and form of Rules 131 and 136, Texas Rules of Appellate Procedure, so far as reasonably applicable. Oral argument may be granted upon application or ordered by this court. If granted or ordered, argument shall be as provided in 172, Texas Rules of Appellate Procedure.

(f) Notice to the Attorney General. When the constitutionality of a Texas statute is the subject of a certified question to which the State of Texas or an officer, agency or employee of the state is not a party, the clerk of the Supreme Court shall notify the Attorney General and shall permit the State of Texas to intervene for presentation of briefs and oral argument on the question of constitutionality.

(g) The Answer to the Certified Question. After all motions for rehearing have been overruled, the written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

(h) All time limits shall be in accordance with the Texas Rules of Appellate Procedure, so far as reasonably applicable.

APPENDIX F

Detailed Factual Background of This Case

Word of Faith World Outreach Center Church is an independent Christian Church whose religious beliefs are similar to those held by the members of the Pentecostal movement. Tr. 6:167-72. At the core of the Church's teachings is a belief in spiritual healing – the healing of physical ailments through faith and the spiritual power of God – and the belief that tithing as required by the Bible is a basic part of Christian life. Tr. 6:179-80.

Approximately 3000-4000 members attend weekly services at the Church's main sanctuary in Farmers Branch, Texas and thousands more view these services on television. Tr. 6:39, 182. In addition to conducting religious services, the Church is involved in numerous other activities including the operation of a prison ministry, youth programs, and a large, well-respected private school, Liberty Academy. Tr. 6:36, 43. The Church also funds missions and charities in Mexico, Guatemala, Haiti, and South Africa, and operates an extended outreach program which in recent years has sponsored large crusades in the Philippines, India and South Africa where literally hundreds of thousands of people have been exposed to Christianity. Tr. 6:109-10, 182-83. Reverend Tilton is the Church's founder and head pastor.

The events which led to the filing of this Petition for Writ of Certiorari began on November 21, 1991 when the ABC television tabloid Prime Time Live televised a segment on the Church and Reverend Tilton in which several

accusations of wrongdoing were made. P. Ex. 8. Simultaneously with the airing of Prime Time Live a representative of the Attorney General's Office held a news conference in which he announced an investigation of the Church and suggested that the Church and Reverend Tilton were guilty of fraud. P. Ex. 8. Within a few days after the airing of Prime Time Live, the Church's attorney, J.C. Joyce, notified various state and federal agencies that the Church's records would be made available for their inspection. Tr. 6:78, 142-43. Mr. Joyce personally telephoned the Attorney General's office and invited representatives to come examine any of the Church's records they wanted. Tr. 7:480-81. The Federal Bureau of Investigation ("FBI") and the Postal Inspection Service accepted the Church's offer and began an examination of the Church's records. Tr. 6:78-79, 143. All Church records requested by these agencies were made available to them. Tr. 6:143, 161-62. Neither the FBI nor the Postal Inspection Service made any public comment or announcement regarding their investigations of the Church. Tr. 6:79.

In contrast to the actions of the FBI and the Postal Inspection Service, the Attorney General refused the Church's offer to review its records and instead released a statement to the media calling the Church's offer to open its records a "show-boating trick, just to give the appearance of propriety." P. Ex. 22, Tr. 6:157.

In addition to this gratuitous attack on the Church, representatives of the Attorney General's office made numerous other statements to the press intimating that the Church had committed fraud. P. Ex. 22.

On January 13, 1992, over six weeks after refusing the Church's offer to examine its records, the Attorney General sent a letter to the Tiltons informing them that the Attorney General's Office had "reason to believe" that the Church had violated provisions of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code § 17.41 *et seq.* (the "DTPA"). P. Ex. 23; Tr. 6:85-86. The letter demanded the turnover of 55 categories of documents and information pertaining to some of the most sensitive aspects of the Church's organization and finances. Included in the documents demanded were a list of church members and scripts of sermons. P. Ex. 23. The Attorney General gave the Tiltons until February 10, 1992, to produce the requested documents at the Attorney General's offices in Dallas. The letter did not explain how or why the Attorney General suspected the Church or Reverend Tilton of violating the DTPA.

In a letter dated January 17, 1992, J.C. Joyce responded to the Attorney General's document demand by requesting a meeting with the Attorney General for the purpose of discussing the voluminous information and documents requested in the January 13 demand letter and the reasons for the demand. RE:21-23, P. Ex. 33. Pending that meeting, Mr. Joyce requested an extension of time for the production of the requested documents based on the expectation that at the proposed meeting "we will be able to either eliminate the necessity to respond at all, or, if a response is called for, that it be limited." *Id.* Mr. Joyce went on to explain that many of the items requested, such as tapes of all the Church's past sermons, would require a great deal of time to copy, but

that the Church would provide the original tapes to the Attorney General for viewing.

By the date of the Attorney General's demand letter, media coverage of the Attorney General's investigation of the Church and Reverend Tilton had waned considerably. On January 22, 1992, with no prior warning to the Church or Reverend Tilton, the Attorney General's office *faxed* the January 13 demand letter to numerous newspapers and television stations in Texas and Oklahoma and to the Associated Press Wire News Service. Tr. 6:89-90. As might have been expected, the release of the demand letter produced a flurry of negative newspaper articles and television news reports in which the Attorney General's accusations contained in the letter were repeated. Tr. 6:90.

After the Attorney General refused to meet with Reverend Tilton or his counsel, Mr. Joyce sent another letter to the Attorney General dated January 29, 1992, in which he protested the Attorney General's release of the January 13 demand letter to the media and again requested a meeting in which the dispute over the document demand could be resolved. P. Ex. 34. Mr. Joyce also informed the Attorney General that if he continued to refuse to meet with him and grant an extension of the February 10, 1992 deadline for the production of the requested documents, the Church would file suit in federal court on February 6, 1992 in order to protect its rights under the United States Constitution. *Id.* In a letter dated January 30, 1992, the Attorney General's office responded to Mr. Joyce by again refusing to meet with Reverend Tilton and Mr. Joyce. P. Ex. 24.

At 5:07 p.m. on February 5, 1992, one day before Mr. Joyce had said he would file suit in federal court and *five days before* the February 10, 1992 deadline for the Tiltons to comply with his document request, the Attorney General filed an Information in Quo Warranto, Original Petition and Application for Injunction, Forfeiture of Charter and Appointment of a Receiver (the "Quo Warranto") in Travis County Probate Court. Appellant's RE: 56-62, Tr. 2:222-72. In order to obtain immediate media attention, the Attorney General's office *faxed* the Quo Warranto to various newspapers and television stations before the Church, Reverend Tilton and their attorney were notified of its filing. Tr. 6:195. The Attorney General did not file the Quo Warranto under the DTPA, but rather under Article 1302, Chapter 5, Texas Miscellaneous Corporation Laws Act (the "MCLA"), which the Attorney General on p. 4 of the Quo Warranto asserted gave the Attorney General or his representatives the authority "to examine any books or records of a Texas corporation as he may deem necessary. . . . "

Even though the Attorney General's suit was filed five days before the deadline for the production of the documents requested in the January 13 demand letter, the Quo Warranto recited that the Church had failed to comply with the document demand and on that basis sought: 1) a permanent injunction ordering the Church to produce the records demanded by the Attorney General; 2) the forfeiture of the Church's charter and dissolution of the corporation; 3) the appointment of a receiver to take possession of the affairs of the corporation; and 4) a permanent injunction against the Church or anyone affiliated with the Church from conducting any "business" of

the Church. Appellant's RE:57, Tr. 2:223. In filing the Quo Warranto, the Attorney General sought, in effect, to seize the Church's property and discontinue all of the Church's operations, including its religious operations in the state of Texas.

On February 7, 1992, the Church and the Tiltons filed their Complaint and request for injunctive relief with the district court pursuant to 42 U.S.C. § 1983. Tr. 1:1-100. On that same day the Church and the Tiltons obtained a temporary restraining order from the district court preventing the Attorney General from proceeding with the Quo Warranto action or from taking any steps to enforce the January 13 document demand. Tr. 1:127-129. The hearing on the preliminary injunction was set for March 4, 1992. *Id.*

On March 18, 1992, following a two day trial on March 4 and 5, 1992, the district court issued a 27 page Memorandum Opinion and Order and accompanying Judgment in which it permanently enjoined the Attorney General from attempting to enforce the January 13 document demand letter and from proceeding with the Quo Warranto action. (App. 63)

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Supreme Court, U.S.
FILED
JUL 23 1993
OFFICE

No. 92-1959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, INC., *etc., et al.*,

Petitioners,

v.

DAN MORALES, Attorney General of Texas,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether the Fifth Circuit correctly directed the district court to abstain under the *Pullman* doctrine in circumstances where a religious organization and its officials claimed in federal court that a state law enforcement official's request that a state court order the church to produce forty-one types of documents in connection with the initial step of a state fraud investigation of the church's fundraising activities had the potential ultimately to so involve the state in church religious affairs that it might violate the church's First Amendment rights to freedom of religion and freedom from the establishment of religion?

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED	1
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. The *Pullman* abstention standard applied by the Fifth Circuit in this case is not in conflict with decisions by this Court or any other circuits.	6
II. This case does not present any important questions of federal law that need to be settled by this Court.	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page(s)
Browning v. Navarro, 894 F.2d 99 (5th Cir. 1990)	9
DeFunis v. Odegaard, 416 U.S. 312 (1974)	11
Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)	5
Growe v. Emison, 113 S.Ct. 1075 (1993)	9
City of Houston v. Hill, 482 U.S. 451 (1987)	6
Kentucky v. Graham, 473 U.S. 159 (1985)	5
Morales v. TWA, 112 S.Ct. 2031 (1992)	11
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)	5
Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941)	*passim*
Tilton v. Capital Cities/ABC Inc., No. 92-C-1032-B (N.D. Okla.)	2
Tilton v. Moyé, No. D-3902 (Tex. July 8, 1993)	3
Tilton v. Moyé, No. A-30 (U.S. July 12, 1993)	3
Tilton v. Smith, Civ. Action No. 393-CV-1348p (N.D. Tex.)	3

Statutes and Rules: *Page(s)*

Rules of the Supreme Court of the United States, Rule 15 2

Texas Deceptive Trade Practices - Consumer Protection Act, TEX.CIV.STAT.ANN. §§ 17.41-17.63 (Vernon 1987 & Vernon Supp. 1993) 2

Texas Miscellaneous Corporation Laws Act, TEX.CIV.STAT.ANN. art. 1392-5.09A (Vernon Supp. 1993) 4

Texas Non-Profit Corporation Act TEX.CIV.STAT.ANN. art. 1396-6.06B (Vernon 1980) 4

Secondary Authority:

Wright, Miller & Cooper 17A FEDERAL PRACTICE AND PROCEDURE § 4248 (1988 & Supp. 1993) 9,10

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DAN MORALES, Attorney General of Texas,

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BRIEF IN OPPOSITION

Dan Morales, the respondent in his official capacity as Attorney General of Texas ("Attorney General"), requests that the Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's judgment in an opinion reported at 986 F.2d 962. The three petitioners are Word of Faith World Outreach Center Church, Inc., Reverend Robert Tilton, and Martha Phillips Tilton (collectively, "the Tiltons," "the church," or "Word of Faith").

STATEMENT OF THE CASE

Word of Faith's portrait of this case is not a realistic one. It paints the Attorney General's preliminary steps toward investigation of church officials for possible fraud as an attempt to suppress the church's religious teachings. Because these preliminary state investigatory steps frame the Fifth Circuit's *Pullman* abstention order, they are outlined in some detail here as a way of addressing "misstatements of fact or law . . . which have a bearing on the question of what issues would properly be before the Court," Court Rule 15.

Among other things, this recitation of the facts demonstrates that the Attorney General has never tried to suppress Word of Faith's religious teachings. Fraud was and is the target, and the perpetration of fraud is not one of the church's religious tenets.

Founded in 1976, Word of Faith had accumulated by trial a 500,000 person mailing list and a membership of up to 13,000. It grossed $65 million in 1991 on an operating budget of $50 million. Tilton App. 2.

The principal event precipitating the church's involvement with the Attorney General was the ABC network's airing of a *PrimeTIME Live* program on television evangelists. The program's third segment focused on the Tiltons and their fundraising activities for Word of Faith and presented an "unflattering" picture of them. Tilton App. 2-3.[1]

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[1] On July 16, 1993, in a separate legal dispute, a federal district court denied Reverend Tilton's motion for a preliminary injunction against rebroadcasting or republishing parts of the third *PrimeTIME* segment. *Tilton v. Capital Cities/ABC Inc.*, No. 92-C-1032-B (N.D. Okla.).

The church and the Tiltons came under increased federal and state scrutiny following the airing of the *PrimeTIME* segment. Tilton App. 3; Tr. 6:78-79, 6:142. The Attorney General publicly announced that he was looking into whether the church was complying with state antifraud and nonprofit corporation laws which he enforces. Tr. 6:51; 6:75; 7:378-79.

A month and a half later, the Attorney General issued a formal civil investigative demand ("CID"), requesting production of fifty-five documentary items to help him evaluate whether the church's trade practices and charitable solicitations might violate the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"). P.Ex. 23. Word of Faith did not produce the documents.[2] Instead, there followed a series of exchanges, both in the press and through correspondence, between church representatives and the Attorney General's office. *E.g.*, Tr. 7:411; P.Ex. 24, 34. The church and the Tiltons said that they wanted to meet to see if the Attorney General could convince them they should produce the documents; they also indicated that they intended to file a federal

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[2] The church and the Tiltons continue their resistance to document production requests in a setting that already has made its way to this Court. They recently sought mandamus protection from a Texas state district court discovery production order in a private suit. The Supreme Court of Texas denied the mandamus effort as to certain documents, while keeping other aspects of the dispute pending. *Tilton v. Moyé*, No. D-3902 (July 8, 1993). Justice Scalia denied a stay request by the church and the Tiltons. *Tilton v. Moyé*, No. A-30 (July 12, 1993). On July 9, 1993, the church and Reverend Tilton filed a federal section 1983 suit against the private plaintiff and the presiding judge in the state district court suit, claiming that production of certain documents would violate their First Amendment rights. *Tilton v. Smith*, Civ. Action No. 393-CV-1348p (N.D. Tex.). The district court in that suit denied a restraining order and dismissed the suit on July 19, 1993.

court suit on a specified day. The Attorney General became convinced that an impasse had been reached and the documents were not going to be produced voluntarily. Tilton App. 4.

Under authority of the state Miscellaneous Corporation Laws Act ("MCLA"), the Attorney General then filed a *quo warranto* suit in state probate court, seeking to compel production of the documents requested in the CID and, failing that, forfeiture of the church's corporate charter.[3] The probate court issued a show cause order and set the case for a hearing.

The day after issuance of the show cause order, the church and the Tiltons filed their federal suit to avoid production of the requested documents and enjoin the state court proceeding; they obtained a temporary restraining order which halted the state court proceedings. Tilton App. 5. As the case went to trial, the church and the Tiltons took the position that producing the requested documents would violate First Amendment rights of freedom of association, freedom of religion, and freedom from the establishment of religion. They also claimed that the Attorney General, who was sued in his official capacity only,[4] was unauthorized by state law (*i.e.*,

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[3] Later, after the district court judgment, the church voluntarily dissolved its corporate status. Texas law maintains a de facto form of post-dissolution corporate status for pre-dissolution activity. *See, e.g.*, Texas Non-Profit Corporation Act, TEX.CIV.STAT.ANN. art. 1396-6.06B (Vernon 1980); MCLA, TEX.CIV.STAT.ANN. art. 1302-5.09A (Vernon Supp. 1993).

[4] Word of Faith initially sued the Attorney General and several members of his staff both officially and individually, seeking monetary and injunctive relief. Shortly before trial, the complaint was amended, dropping all the staff members and explicitly dropping the individual-capacity part of the suit against the Attorney General. R. 2:199. This

the DTPA and MCLA) to undertake his investigation of the church

As the federal suit went to trial a month later, the Attorney General narrowed his state CID to forty-one items and modified the requested state court relief to production of the documents -- which always had been the objective of the state suit. The federal district court rebuffed the Attorney General's open-court effort and proceeded to find unconstitutional the very requests the Attorney General had abandoned -- but whose maintenance had been dictated by the court. Tilton App. 5 n.3; 16 & n.10. The district court also rejected the Attorney General's request that it abstain under the *Pullman* and *Younger* abstention doctrines. Tilton App. 30-34.

The district court's injunction against the Attorney General rested on both state and federal grounds. While rejecting the Attorney General's argument that the Eleventh Amendment *Pennhurst II* doctrine[5] invalidated

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intentional step requires treatment of this action as an official-capacity, not personal-capacity, one against the Attorney General. *Cf. Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (Court looks to course of trial proceedings to determine capacity *if* the complaint does "not clearly specify whether officials are sued personally, in their official capacity, or both").

5 *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The Fifth Circuit's Eleventh Amendment analysis essentially adopted the ultra vires rationale of *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). Tilton App. 9. *Pennhurst II* questions the "continued vitality" of the *Treasure Salvors* principle. 465 U.S. at 114 n.25. Denying certiorari here will avoid any possible need for the Court to revisit this Eleventh Amendment issue. In the case's present status, the Fifth Circuit's discussion of the Eleventh Amendment issue is merely dictum.

the state law ground for the injunction against the Attorney General, the Fifth Circuit nonetheless reversed the district court and overrode its injunction.

The Fifth Circuit found the abstention doctrine of *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), "tailor-made" for application in this case. Tilton App. 18. It determined that the "muddled presentation of the issues in this case . . . should make apparent the danger of a federal court's interfering at too early a stage, only to promulgate an advisory opinion." Tilton App. 17-18.

REASONS FOR DENYING THE WRIT

I.

The *Pullman* abstention standard applied by the Fifth Circuit in this case is not in conflict with decisions by this Court or any other circuits.

The Fifth Circuit applied the *Pullman* abstention doctrine to what is effectively a discovery dispute over which documents should be produced in connection with a prior state court proceeding. Nothing in the doctrine's application in this case conflicts with this Court's precedents or decisions from other federal circuits which follow those precedents.

First, it must be recognized that this case does not present a First Amendment challenge to the facial validity of a state statute. Therefore, the principle that *Pullman* abstention should not be invoked in First Amendment facial challenges, *see City of Houston v. Hill*, 482 U.S. 451, 468 (1987), is inapplicable.

The facial constitutionality of the Texas DTPA and MCLA has never been at issue in this case. Those statutes are entirely neutral, and Word of Faith has never asserted their facial invalidity. (They are not even included in the "Statutory Provisions Involved" section of the certiorari petition.) Instead, Word of Faith has argued that the Attorney General's effort to investigate their applicability to the church, through his document request and state court action to enforce the request, threatens invasion of First Amendment associational and religious rights of the church's members.

Second, Word of Faith's argument that some past Fifth Circuit opinions have incorrectly stated and applied the *Pullman* abstention test is entirely academic. The court correctly stated and applied it *in this case*. In fact, the *Pullman* refrain that the state law must be unsettled and capable of construction in a way that might narrow or eliminate the federal constitutional issues suffuses the Fifth Circuit opinion. Quoting from an earlier en banc opinion, the court observes that the state law in question must be "fairly susceptible" of an interpretation that might avoid or substantially modify the federal constitutional question. Tilton App. 11. A few pages later, the court determines that "unsettled questions regarding the application of state law in this case . . . could have mooted the federal constitutional issue." Tilton App. 14. Still later in the opinion, the court highlights "the *many* unresolved state law issues in this case." Tilton App. 17 (emphasis added).

The Fifth Circuit's decision, both in words and deed, is a straightforward application of a straightforward reading of the *Pullman* doctrine. As the court stated, *Pullman* was "tailor-made" for application here. The court understood the potential for the state document production litigation to substantially narrow any constitutional issues which Word of Faith ultimately might

want or need to bring into federal court. There is no conflict at all between what the Fifth Circuit did here and what this Court has directed courts to do in applying the *Pullman* doctrine; likewise, there is no conflict between the Fifth Circuit decision and the rule of *Pullman* abstention used in every other federal circuit court of appeals.

II.

This case does not present any important questions of federal law that need to be settled by this Court.

The Fifth Circuit's abstention ruling authorizes no far-reaching action; its effect is limited to the peculiarities of its factual setting. It simply enables the Attorney General to seek state court permission to take the first step of an investigation into whether Word of Faith and the Tiltons have committed civil fraud (or some other transgression of state statutes) in connection with fundraising and related activities on behalf of the church.

Without necessarily referring to the issues as important ones of federal law, Word of Faith suggests that this case offers the Court an opportunity to reevaluate a criticized doctrine, to determine whether certification should have been initiated by the court instead of the *Pullman* abstention doctrine, and to decide whether some kind of bad faith precludes invocation of that doctrine even if it is otherwise applicable to a given litigation circumstance. Certainly as presented in this case thus far, none of these issues presents a question of importance for the Court to resolve.

Nothing in this case raises any questions about the continued viability or meaningfulness of the *Pullman* abstention doctrine. Indeed, the case demonstrates the opposite point. It highlights just how meaningful *Pullman*

abstention continues to be in enabling federal courts to avoid premature constitutional rulings Invoking the doctrine here means that federal courts will not have to engage in a series of factual surmises about what *might* happen at the end of a possible investigation of certain church activities for possible state law violations and then conclude whether those facts, should they ever come to pass, would raise valid First Amendment concerns. This case teaches a clear lesson about the inadvisability of a retreat from *Pullman*.

Besides, the Court has shown no inclination to retreat from *Pullman* as a way to honor federalism and the limits of federal judicial power. Just this term, the Court has cited *Pullman* approvingly and given its underlying principles specialized application in the reapportionment context. *See Growe v. Emison*, 113 S.Ct. 1075, 1080 (1993).

Similarly, this case is hardly the appropriate one for teaching lower courts about the benefits of state certification procedures. Word of Faith, not the Attorney General, chose to pursue this litigation in federal court and raise there so many state law questions. Adopting a litigation strategy that belies their current espousal of the benefits of certification, the church and the Tiltons did not even mention certification in their briefs and oral argument to the Fifth Circuit. The first time the question appears is in the church's motion for rehearing, too late for serious appellate consideration by the Fifth Circuit, *see Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990) (generally, party may not raise an argument for the first time in a petition for rehearing). As a leading federal court commentary states: "[T]he failure of a party to suggest certification until a late stage in the proceeding considerably weakens his insistence on certification." Wright, Miller & Cooper, 17A FEDERAL PRACTICE AND PROCEDURE § 4248 at 16 (Supp. 1993).

There is an additional flaw in Word of Faith's certification argument. The circumstances of this case do not lend themselves to encapsulation in a reasonably succinct statement of settled facts for presentation to the Supreme Court of Texas. Forty-one categories of documents are requested, but the number the state courts might require produced under state law is presently unknowable. The investigation has barely begun, having been judicially halted in mid-step as the state court process for obtaining the requested documents was just getting underway. The future turns the investigation might take are matters of pure speculation. Framing a factual summary for presentation to the state's highest court is an impossibility in such a situation as this, thereby making certification inappropriate. Wright, Miller & Cooper, 17A FEDERAL PRACTICE AND PROCEDURE § 4248 at 174 (1988) (certification inappropriate if "there are a number of disputed factual issues making it difficult or impossible to agree on what the legal questions are").

Finally, the Fifth Circuit's ruling that *Younger* bad faith issues are inapplicable in *Pullman* abstention settings, Tilton App. 16-17 n.10, raises no consequential or important federal issues worthy of this Court's attention. No court has ever indicated that the law is any different than it was laid down by the Fifth Circuit in this case.

More critical on this point, as the Fifth Circuit explicitly noted, is the fact that the district court's bad faith concerns focused upon the very requests from which the Attorney General had receded only to be rebuffed by the district court. In this regard, the Fifth Circuit noted that, even if *Younger* and *Pullman* exceptions were identical (which they are not) and even if the district

court had so treated them (which it did not),[6] "the Attorney General's modified request presents no continuing constitutional violation justifying the 'extraordinary' exception to *Pullman*[.]" Tilton App. 17 n.10.

The district court's rebuff of the Attorney General's effort to narrow the document discovery dispute in state court was an aberrational extension of federal judicial power into speculative realms; the Fifth Circuit's reversal of the district court's speculation-laden injunction was not. *See Morales v. TWA*, 112 S.Ct. 2031, 2036 (1992) ("a conjectural injury cannot warrant equitable relief"); *cf. DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (observing the practice of federal court acceptance of solemn commitments by state attorneys general).

As a practical matter, concluding this case through denial of certiorari is the only important federalism principle raised by this case. Only then can the state courts begin to sort out the state law boundaries of the Attorney General's investigatory powers under the DTPA and the MCLA; only then can the state court denouement be reached so that there can be a concrete determination (by the church itself or by a federal court should the matter be presented to it) whether Word of Faith has any arguable residue of a First Amendment complaint about the outcome of the state proceedings.

CONCLUSION

For the foregoing reasons, the Court should deny the request to issue a writ of certiorari to review the Fifth Circuit's judgment reversing the district court injunction and ordering abstention.

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6 "We do not understand the district court to have rejected *Pullman* . . . on the basis of the Attorney General's bad faith[.]" Tilton App. 17 n.10.

Respectfully submitted,

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